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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SGT. B. D. SMITH,

Petitioner,

v.

MILTON McCRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEPHEN H. SACHS,
Attorney General
of Maryland,

DONALD R. STUTMAN,
Assistant Attorney General,
One South Calvert Building,
Baltimore, Maryland 21202,
383-3737
For Petitioner.

The Daily Record Co., Baltimore, MD 21202

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err when it held that Petitioner had not established qualified immunity?

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MILTON McCRAY,

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err when it held that Petitioner had not established qualified immunity?

OPINIONS BELOW

The first Opinion of the United States District Court for the District of Maryland is *McCray v. Burrell,* 367 F. Supp. 1191 (D. Md. 1973). On appeal, the same was reversed in *McCray v. Burrell,* 516 F.2d 357 (4th Cir. 1975). [Hereinafter *McCray I*]. Certiorari was granted by this Court and

subsequently dismissed as improvidently granted in *McCray v. Burrell,* 426 U.S. 471 (1976). On remand, the Opinion of the United States District Court in *McCray v. Smith* was filed on August 16, 1977 and appears in the Appendix to this Brief. On appeal, the Opinion of the United States Court of Appeals for the Fourth Circuit was filed on June 4, 1980 in *McCray v. Smith,* F.2d (4th Cir. (1980), and is set out in the Appendix [Hereafter *McCray II*].

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit was filed on June 4, 1980. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Eight, United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment Fourteen, Section 1 and Section 5, United States Constitution, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

United States Code, Title 42, § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The complaint in this case invoked the jurisdiction of the United States District Court pursuant to 28 U.S.C. § 1343(3) and (4) U.S.C. § 1983 and the Constitution of the United States.

Respondent sought relief for alleged deprivations of liberty without due process of law and for alleged imposition of cruel and unusual punishment arising out of an incident which occurred at the Maryland Penitentiary in November, 1971 in which he was initially placed, without clothes, in an isolation cell for approximately 48 hours as a result of his disruptive behavior. The United States District Court in *McCray v. Burrell,* 367 F. Supp. 1191 (D. Md. 1973) found no constitutional violation on the part of Petitioner and found that he had acted in accordance with standard operating procedures which were not violative of Respondent's civil rights. The District Court further found that Respondent was required to exhaust his State administrative remedies provided in Article 41, § 204F, Annotated Code of Maryland.

This case, along with others consolidated for purposes of appeal were heard before a three judge panel of the United States Court of Appeals for the Fourth Circuit on June 6, 1974. Following argument, the Fourth Circuit, on June 27,

1974, ordered the cases to be heard en banc on October 1, 1974.

On April 10, 1975, the Fourth Circuit held that exhaustion of State administrative remedies was not required prior to invoking Federal jurisdiction, reversed the judgment of the District Court and remanded this case for further proceedings in accordance with its finding that Respondent was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

A petition for the issuance of the writ of certiorari was timely filed and by Order of November 3, 1975, this Court granted the writ of certiorari and after briefing and argument, dismissed the writ of certiorari as improvidently granted in *McCray v. Burrell,* 426 U.S. 471 (1976).

On remand, the District Court entered judgment for Petitioner on August 16, 1977 in *McCray v. Smith,* No. N-72-234 (D. Md. 8/16/77) following its determination that Petitioner had established his good faith defense to the complaint.

On appeal to the Fourth Circuit, the Court reversed that part of the decision of the District Court relating to Petitioner herein and remanded the same in *McCray v. Smith,* ____ F.2d ____ (4th Cir., June 4, 1980). From that decision, Petitioner has filed the instant petition for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit.

On November 20, 1971, Respondent was confined in the segregation section of the Maryland Penitentiary where he created a substantial disturbance in his cell. Petitioner, who worked the 8 a.m. — 4 p.m. shift at the Maryland Penitentiary and was in charge of the segregation section, had Respondent confined to an isolation cell (hereinafter

IC) for a cooling off period. An Administrative Directive issued by the Division of Correction of Maryland allowed use of the isolation cells for inmates who were either emotionally disruptive or mentally disturbed. (The Administrative Directive, No. 12-70, is set out in the Appendix). According to the Administrative Directive, inmates who were emotionally disruptive or exhibited acting out behavior could be placed in the IC cell for a cooling off period. Inmates who were mentally disturbed could be placed in an IC cell but there was a further requirement that a psychologist/psychiatrist should be contacted immediately and the inmate evaluated within 24 hours.

Respondent was placed in the IC cell without clothes or articles of personal hygiene, because Petitioner did not want Respondent harming himself and because weapons or other devices can be made out of almost anything. Petitioner further indicated that Respondent's clothes were removed as Respondent said he was going to kill himself and under such circumstances, the removal of clothing was standard operating procedure at the Maryland Penitentiary. Petitioner felt, however, that although Respondent had threatened to kill himself, disruptive inmates normally make such threats and Petitioner took precautions to be sure that Respondent did not harm himself or others. A psychiatrist or psychologist was not called when Respondent was initially placed in IC because Petitioner did not feel he was mentally disturbed. Although Respondent threatened many things, he did not do anything physically to himself to indicate he would attempt to harm himself. The only thing Respondent did was talk.

Respondent was placed in the IC cell due to his acting out behavior and the need to prevent him from causing a disturbance in the rest of the cell house area. Petitioner immediately notified his superior of his actions. At shift

change, Petitioner told his relief to watch Respondent and if he had calmed down, he was to get back his clothes and personal hygiene items.

When Petitioner returned to work the next day at 8 a.m., he found that Respondent had smeared feces in the cell and he immediately called the institutional psychologist. He had Respondent taken out of his cell, showered and had the cell scrubbed down and disinfected. Later that day, Respondent received his clothes, personal papers and other personal items after he had stopped acting out. The psychologist arrived sometime thereafter to examine Respondent. Petitioner did not feel, when he first placed Respondent in the IC cell, that he was other than emotionally disruptive, that is, acting out, and did not feel he needed professional help until the following morning after he had seen what Respondent had done in the cell. Prior to this incident, Petitioner had had no previous contact with Respondent.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT HELD THAT PETITIONER DID NOT ESTABLISH QUALIFIED IMMUNITY.

A. Standard of Review:

Rule 52(a), Federal Rules of Civil Procedure, states that in an action tried without a jury "[F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See *Dayton Board of Education v. Brinkman,* ___ U.S. ___, 99 S.Ct. 2971, 2977 (1979); *Friend v. Leidinger,* 558 F.2d 61 (4th Cir. 1978), *North Central Airlines v. Continental Oil Co.,* 574 F.2d 582 (D.C. Cir. 1978) and *Daniels v. Hadley Memorial Hospital,* 566 F.2d 749 (D.C. Cir. 1977).

In *Bianchini v. Humble Pipeline Co.,* 480 F.2d 251, 253 (5th Cir. 1973) that Court stated:

> " 'The question is not simply whether the reviewing court would have found otherwise but whether the trial court could permissibly find as it did. The reviewing court should upset a finding only when it "is convinced on the whole record that the finding does not reflect the truth and right of the case." Wright, Federal Courts § 96, at 432.' " See also *Daniels, supra,* at 756 and *Case v. Morrisette,* 475 F.2d 1300, 1307-8 (4th Cir. 1973).

B. Qualified Immunity:

The modern doctrine of qualified immunity had its inception with this Court's decision in *Pierson v. Ray,* 386 U.S. 547, 555 (1967), where immunity excused Defendant from liability ". . . for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied." In *Scheuer v. Rhodes,* 416 U.S. 232, 247 (1974), this Court limited immunity under 42 U.S.C. § 1983 to less than that enjoyed at common law by State officials and adopted a rule which provided that ". . . in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." Qualified immunity would therefore be afforded to officials who acted in good faith and with a belief for which there were reasonable grounds, in light of all the circumstances, at the time that belief was formed.

In *Wood v. Strickland,* 420 U.S. 308 (1975), qualified immunity available to State officials was fashioned into a clear and specific test. As set forth in *Wood,* the qualified immunity for public officials under § 1983 involved a

two-prong test. Liability is avoided if (1) the official did not know or should not have known that the action he took within his sphere of official responsibility would violate the clearly established constitutional rights of the person affected (objective prong) and (2) the official must act sincerely and with a belief that he is doing right (absence of malice or improper motivation) (subjective prong). The qualified immunity established in *Wood* has been extended to prison officials. See *Procunier v. Navarette,* 434 U.S. 555 (1978).

In *Wood,* this Court in discussing the objective prong of qualified immunity indicated that the before liability would attach a defendant must violate the ". . . unquestioned constitutional rights of his charges. . . .", and that the law must be ". . . settled, indisputable law . . ." and that the school board members in *Wood* were not "'charged with predicting the course of constitutional law.'" *Wood, supra,* at 321-322. Discussing the objective prong of *Wood* in *Procunier,* this Court stated:

> "Under the first part of the *Wood v. Strickland* rule, the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm. . . . Whether the state of the law is evaluated by reference to the opinions of this Court, of a Court of Appeals, or of the local District Court, there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972." *Procunier, supra,* at 562, 565.

In *Procunier,* this Court, while not considering the subjective ground of malicious intention, stated:

> "To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is

> clearly not implicated by the negligence claim now before us." 434 U.S. at 566.

Similarly, in *Wood,* this Court spoke of "impermissible motivation" when discussing the subjective intent necessary to avoid a qualified immunity defense. *Wood, supra,* at 322. Therefore, with respect to immunity, an official's inadvertent failure to take some precaution not previously required by the courts would be insufficient to constitute the malicious intention which forfeits his qualified good faith immunity. See *Bogard v. Cook,* 586 F.2d 399, 411-12 (5th Cir. 1978). In the absence of subjective bad faith, when an act does not violate settled, indisputable law, there is no liability.

C. Misapplication of Qualified Immunity in this Case:

The Fourth Circuit in *McCray* I did not hold that conditions in the IC cell violated Respondent's Eighth Amendment rights, but posited several questions to be answered on remand in order for Petitioner to avail himself of the good faith defense. Smith had to establish:

> "(1) an explanation for his decision to confine plaintiff in an isolated cell rather than a mental observation cell; and
>
> (2) A reasonable understanding that his notification of the psychologist approximately 24 hours after plaintiff entered the isolation cell complied with requirements of the administrative directive." *McCray v. Smith, supra* at App. 10a-11a. [Footnote omitted]

The District Court found that Administrative Directive No. 12-70 covered two distinct factual situations. "Paragraph one permitted isolation of inmates who were emotionally disturbed in the isolation cells and did not require notification of a psychologist. Paragraph three permitted isolation of inmates who were mentally disturbed in the mental observation cells but required that a psychologist be notified immediately and that the inmate

be evaluated within 24 hours." *McCray v. Smith, supra,* at App. 13a. This classification in the Administrative Directive of two different groups of individuals was acknowledged by all of Petitioner's witness and a witness called by Respondent. Under these circumstances, individuals classified as emotionally disruptive did not trigger the requirement that a psychologist or psychiatrist be called for examination. Respondent was placed in the cell without clothes or personal hygiene articles because Petitioner did not want Respondent harming himself or others and although Respondent indicated he was going to kill himself, Petitioner still felt that Respondent was only emotionally disruptive and did not call the psychiatrist/psychologist. Although Respondent threatened to harm himself, he did nothing except talk and these threats were common from disruptive inmates. The precautions taken by Petitioner were standard operating procedures for disruptive inmates at the Maryland Penitentiary.

Following Respondent's assignment to the IC cell for a cooling off period, Petitioner notified his supervisor and informed his relief at shift change to watch Respondent and give him back his personal items if he calmed down. Only when Petitioner returned to work the next morning and found what Respondent had done in his cell did he feel that Respondent was, at this point, mentally disturbed and immediately notified the institutional psychologist, had Respondent showered and the cell scrubbed down and disinfected. Later that day, when Respondent had calmed down, he was given his personal items. Petitioner further indicated that there were no less restrictive means at his disposal when he placed Respondent in the IC cell.

The District Court found as a fact that Respondent was emotionally disruptive and not mentally disturbed at the time he was placed in the IC cell and had his personal effects removed pursuant to standard operating proce-

dures. When first placed in the IC cell, the District Court found that the precautions taken ". . . were not premised on the conclusion that plaintiff was mentally disturbed." *McCray v. Smith, supra,* at App. 13a. "Having reached this conclusion [that Respondent was emotionally disruptive but not mentally disturbed], Sergeant Smith interpreted the administrative directive as not requiring that he notify a psychologist." *McCray v. Smith, supra,* at App. 13a. The District Court further found that Petitioner had acted in good faith when he determined Respondent was emotionally disruptive and did not call a psychologist.

> "His [Petitioner's] failure to notify the psychologist on the first day of plaintiff's isolation was premised on his good faith belief that plaintiff was not mentally disturbed and that therefore paragraph three, requiring notification of a psychologist after isolating inmates displaying mentally disturbed behavior, was not applicable." *McCray v. Smith, supra* at App. 14a.

The District Court concluded that Petitioner's belief that Respondent was not mentally disturbed was reasonable and that the Administrative Directive provided no guidelines for determining such behavior. *McCray v. Smith, supra* at App. 14a-15a. Petitioner's explanation of his removal of Respondent's personal articles was consistent with his belief that Respondent came within Paragraph 1 of the Administrative Directive and that he acted cautiously. *McCray v. Smith, supra* at App. 15a. The District Court also found that Petitioner acted in accordance with a reasonable belief in the legality of his actions and concluded that the Administrative Directive did not require notification of a psychologist whenever removal of an inmates clothing was ordered. "Thus, Sergeant Smith's failure to notify the psychologist on November 20th did not violate the directive. *Nor could the Court discover judicial decisions before 1972 endowing prisoners with an 'unquestioned' constitutional right to have a psychologist notified immediately whenever they are placed in an isolation cell without clothing, mattress or articles of*

personal hygiene. McCray v. Smith, supra at App. 16a. [Emphasis supplied, Footnote omitted]

Petitioner, under these circumstances, clearly and succinctly answered the questions posed by the Fourth Circuit in *McCray I,* that is: (1) Respondent was confined in an isolation cell rather than a mental observation cell because he appeared to be emotionally disruptive and not mentally disturbed, the latter category calling for the notification of a psychologist/psychiatrist and (2) Petitioner's uncontroverted testimony corroborated fully in the hearing before the District Court, that he did not have to call a psychologist/psychiatrist until he had an indication that Respondent was mentally disturbed.

The Fourth Circuit, in its Opinion, felt that Respondent's confinement in IC could be justified only ". . . if they were reasonably believed necessary for the protection of the prisoner, and if a psychologist or psychiatrist was immediately notified." *McCray II, supra* at App. 3a. The Fourth Circuit had posited in *McCray I, supra* at 368-69 [App. 30a-33a] that the Administrative Directive stated the "constitutional minimum" for such a confinement, "clearly establishing" that requirement in 1975. See *Procunier, supra.* Noting in *McCray II, supra,* at App. 4a that the Administrative Directive drew a sharp distinction between an inmate who was emotionally disruptive from one who was mentally disturbed, the Fourth Circuit nonetheless disregarded that distinction and placed Petitioner in the position where he would be required to guess at the future development of constitutional law. *Wood, supra* and *Procunier, supra.* Disregarding the fact that Respondent's confinement in this case took place in 1971 and the constitutional minimum was not established until 1975, the Fourth Circuit held that:

> "On remand, Smith simply did not meet the possible conditions of showing a good faith defense which we

> envisioned in *McCray I*. He made no claim of compliance with a reasonable understanding of the psychologist notification rule. He simply shifted his position to say that he thought McCray was less seriously disturbed, that no psychologist or psychiatrist was needed and that no notice by him on the 20th was required. This is simply insufficient for a finding of qualified immunity based upon a good faith belief that what he did was lawful and in compliance with prison directives. *McCray II supra* at App. 5a.

In its Opinion, the Fourth Circuit emasculated the objective standard of *Wood* and *Procunier* by its requirement that Petitioner guess at the future development of constitutional law. The testimony of Petitioner at both hearings clearly indicates that he did not feel Respondent was mentally disturbed and for that reason did not notify a psychologist/psychiatrist. The requirement of such notification was not present in the Administrative Directive nor was it clearly established as a constitutional minimum until the Fourth Circuit's decision in *McCray I*. Petitioner, acting in good faith reliance upon standard operating procedures and in conformity with the Administrative Directive, is now told that he acted improperly when no guidance had been previously given him by any judicial decision of which he was aware or should have been aware of at the time he acted. His testimony is consistent with his understanding of the Administrative Directive and under *Procunier* and *Wood,* Petitioner was not required to guess at his peril that what he did in 1971 would be construed as improper in 1975. Coupled with the absence of any testimony indicating a bad faith or malicious motive on Petitioner's part, he established the qualified immunity provided him in *Wood* and *Procunier*. Absent an affirmative finding by the Fourth Circuit that the District Court was clearly erroneous, it should not substitute its judgment for that of the trier of fact.

Although the Fourth Circuit assumed, in its decision in *McCray I*, that Respondent was displaying mentally disturbed behavior, the District Court found that Respondent was not displaying mentally disturbed behavior but was rather "acting out" or emotionally disruptive.

> "Although Sergeant Smith provided an explanation for his decision even assuming that plaintiff was acting mentally disturbed, his conclusion that plaintiff was not acting mentally disturbed undermines the basis for the appellate inquiry, since the directive permitted confinement in the isolation cells for inmates who were not acting mentally disturbed. Similarly, Sergeant Smith's understanding of the requirement that a psychologist be notified immediately has no relevance in light of the Court's finding that Sergeant Smith reasonably believed that plaintiff was not displaying mentally disturbed behavior. The requirement of immediate notification of a psychologist applies only if the inmate is believed to be displaying that behavior." *McCray v. Smith, supra* at App. 16a-17a [Footnote committed].

CONCLUSION

The decision of the Fourth Circuit in this case has so clearly departed from this Court's decisions in *Procunier* and *Wood,* that liability will not attach in the absence of the violation of a "clearly established" constitutional right, as to render the doctrine of qualified immunity meaningless. There was no finding by the Fourth Circuit that the District Court's findings of fact were clearly erroneous but was simply a matter of the application of a subsequent rule established by them in 1975 to conduct which took place in 1971.

For these reasons, Petitioner prays that the Petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit be issued.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General
of Maryland,

DONALD R. STUTMAN,
Assistant Attorney General,
One South Calvert Building,
Baltimore, Maryland 21202,
383-3737
For Petitioner.

APPENDIX

United States Court of Appeals
For The Fourth Circuit

No. 77-2267

Milton McCray,
v.

Appellant,

Robert Burrell,

Appellee.

No. 77-2268

Milton McCray,
v.

Appellant,

Sergeant B. D. Smith
(Badge No. 153) Maryland Penitentiary,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge

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Argued February 5, 1980 *Decided June 4, 1980*

Before HAYNSWORTH, Chief Judge, WINTER and BUTZNER, Circuit Judges

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Richard G. Fishman, Keystone Legal Services, Inc. (Richard L. North, Legal Aid Bureau, Inc. on brief) for Appellant; Donald R. Stutman, Assistant Attorney General (Stephen H. Sachs, Attorney General of Maryland on brief) for Appellees.

HAYNSWORTH, Chief Judge:

In these § 1983 actions, McCray, a prisoner, contends that he was twice subjected to cruel and unusual punishment when on two separate occasions he was placed in solitary confinement without clothing or articles of personal hygiene. The details of McCray's treatment are fully set forth in a previous opinion by this court, *McCray v. Burrell,* 516 F.2d 357 (4th Cir. 1974) (*en banc*) (*McCray I*), and in a published opinion by the district court, *McCray v. Burrell,* 367 F. Supp. 1191 (D. Md. 1973). The defendants are Sergeant Smith, a prison guard, and Captain Burrell, a duty captain in charge of guards.

In *McCray I,* this court held that McCray's Eighth Amendment rights had been violated on both occasions of isolated confinement. The cases were remanded to the district court, however, to determine whether the defendants were entitled to a qualified official immunity from an assessment of damages. On remand, an evidentiary hearing was held, after which the district court concluded that Smith and Burrell had both established good faith defenses to these constitutional violations. The sole issue on this appeal is the propriety of that ruling.

I.

On November 20, 1971, McCray was transferred by Sergeant Smith from a regular cell to an isolation cell. The

initial purpose of the transfer was to put an end to a substantial vocal disturbance which McCray had instigated. On the way to the isolation area, McCray's behavior led Smith to conclude that McCray had the potential of inflicting serious bodily harm upon himself. As a precaution, Smith placed McCray in the isolation cell stripped of all clothing and without items of personal hygiene. Smith testified at the initial trial that he was concerned that McCray might hang himself.

Smith did not notify a psychiatrist or psychologist until the next morning, some twenty hours later. He did send such a notice then, being prompted by McCray's apparent self-abuse in soiling himself. The record does not indicate whether a psychologist ever saw McCray, but it does appear that McCray was released from the isolation confinement on November 22 when he appeared to be "all right."

In *McCray* I we held that the conditions of McCray's confinement in isolation were so severe as to border upon a per se violation of the proscription against cruel and unusual punishment. They could be justified only if they were reasonably believed necessary for the protection of the prisoner, and if a psychologist or psychiatrist were immediately notified. We said:

> What is clear, however, is that if McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant, if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment. The written directive for operation of the place of confinement states specifically that when an "inmate who is displaying mentally disturbed behavior" is "placed in an isolation cell for the inmate's own safety, or that of the inmate population," the "psychologist/psychiatrist should be contacted *immediately* after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period."
>
> . . . .

> . . . In permitting such confinements, the prison directive comports with the eighth amendment. But, when the protective measures take the form of isolation, nude, in I.C. cell No. 5, we believe also that the administrative directive states the *constitutional minimum* in requiring that a "psychologist/psychiatrist . . . be contacted immediately after the confinement of the inmate, and the inmate . . . evaluated within a twenty-four (24) hour period." (emphasis added).

516 F.2d at 368-69.

When *McCray I* was decided, we knew that Smith had not notified a psychologist or psychiatrist until twenty hours had elapsed. Nevertheless, we thought that he might establish good faith immunity if he could prove that he reasonably understood that the administrative direction of immediate action was satisfied by action within twenty hours.

On remand, however, Smith changed his direction. He testified that he did not call a psychologist "immediately" because he did not think that McCray was mentally disturbed. He thought he was only emotionally disruptive.

The administrative regulations make a sharp distinction between one who is emotionally disruptive and one who is mentally disturbed. One who is being emotionally disruptive is threatening the peace and security of the prison but is not thought to be a threat to himself. Confinement of such a prisoner in an isolation cell is authorized for a cooling off period, which might be as much as one hour or such longer time as it takes the prisoner to calm down. Punitive use of an isolation cell upon such a person, however, is authorized. A mentally disturbed individual, on the other hand, may reasonably be thought a threat to himself. Removal and retention of the clothing and other possessions of such an individual may be reasonable insurance that they are not misused for self-inflicted injury. If a mentally disturbed individual is so confined,

however, as McCray was, the immediate notice to a psychologist or psychiatrist is required.

In *McCray I* we accepted Smith's testimony that McCray was threatening harm to himself and was acting in a severely disturbed manner. If that were true, we were of the opinion that removal of his clothing and the deprivation of effects was an appropriate measure for the prisoner's own protection. We were further of the view that his confinement in the isolation cell would not have been in violation of the Constitution if the requirement of immediate notification to a psychologist or psychiatrist had been satisfied.

The underpinning of our reasoning in *McCray* I was completely dissolved during the hearing on remand, however, when Smith testified that he had considered McCray only as emotionally disruptive, that McCray was placed in the isolation cell for the cooling off period and that he thought he was not required to give the notice which is required when the isolated prisoner is thought to be mentally disturbed. The conditions under which Smith confined McCray were those appropriate for a mentally disturbed individual, but without the precaution of sending for professional assistance. The result was that McCray suffered all the deprivations of the harsher confinement with no chance of early relief through professional assistance.

On remand, Smith simply did not meet the possible conditions of showing a good faith defense which we envisioned in *McCray I*. He made no claim of compliance with a reasonable understanding of the psychologist notification rule. He simply shifted his position to say that he thought McCray less seriously disturbed, that no psychologist or psychiatrist was needed and that no notice by him on the 20th was required. This is simply insufficient for a finding of qualified immunity based upon a good faith belief that what he did was lawful and in compliance with prison directives.

II.

On the other occasion of isolation of McCray, Captain Burrell ordered him confined in a "mental observation" cell after McCray had set his mattress afire. There was fear that McCray would injure himself.

In *McCray I* we held that this confinement violated McCray's constitutional rights in two respects. The conditions in the mental observation cell were so stark that any confinement in it was held to be a *per se* violation of McCray's constitutional right. His right was further violated because there was no prompt notification of a psychologist or psychiatrist.

On remand, the district court found that Captain Burrell was entitled to a good faith immunity defense.

The mental observation cell is in the medical wing of the prison and is under the charge and supervision of the medical staff. Captain Burrell was not responsible for the conditions of the cell, and he had been informed that the cleaning procedures in such cells in the hospital wing were better than they appeared to be when we decided *McCray I*. Moreover, the directives requiring staff notification of a psychologist or psychiatrist clearly apply only when a mentally disturbed prisoner is isolated in an isolation cell. That directive does not apply to the general prison staff when a prisoner is transferred to the hospital wing to be placed in a mental observation cell. The omission is reasonable for, upon the transfer, McCray was removed from Captain Burrell's general supervision and authority. Responsibility for McCray's treatment and the conditions of his confinement were then in the medical staff. At that time, there was a reasonable basis for Captain Burrell's belief that the person or persons on duty in the medical wing, confining McCray in a mental observation cell, would immediately notify a psychologist or psychiatrist and arrange the mental observation which the transfer was intended to procure. After McCray's confinement for a period of forty-six hours without having been seen or

observed by a psychologist or psychiatrist, Captain Burrell now may have reason to doubt that the medical staff will perform responsibly in confining, observing and treating a person transferred to a mental observation cell, but this record discloses no reason for any such doubt on Captain Burrell's part at the time of McCray's transfer.

For these reasons, there is adequate support in the record for the district court's finding and conclusion that Captain Burrell acted responsibly and in a good faith belief that the transfer he ordered was not in violation of any of McCray's constitutional rights. He is not responsible in damages for the later neglect and conduct of the medical staff. *Cf. Monell v. Department of Social Services,* 436 U.S. 658, 691-95 (1978).

III.

The judgment of the district court is affirmed in part and reversed in part and the case remanded for an assessment and an award of appropriate damages for the harm suffered by McCray during the twenty-hour period of his confinement by Smith in an isolation cell before notification to a psychologist. They may be determined on this record and, if determined on this record, they need not be substantial in amount, but some award against Smith is necessary and appropriate. *See Cary v. Piphus,* 435 U. S. 247, 266 (1978).

Affirmed in part:
Reversed in part:
Remanded.

In The United States District Court
For The District of Maryland

Civil Action No. N-72-68

Civil Action No. N-72-234

Milton McCray,

v.

Robert Burrell

Milton McCray,

v.

Sergeant V. D. Smith

Filed: August 16, 1977.

Charles F. Morgan, Esquire and Richard Fishman, Esquire, of Legal Aid Bureau, Inc., of Baltimore, Maryland, for the plaintiff in both cases.

Francis B. Burch, Esquire, Attorney General of Maryland, and Donald R. Stutman, Esquire, Assistant Attorney General, for the defendants in both cases.

Northrop, Chief Judge.

INTRODUCTION

Plaintiff, Milton McCray, filed these actions pursuant to 42 U.S.C. § 1983, alleging that defendants violated his

eighth and fourteenth amendment rights. Specifically, he alleged *inter alia* that by confining him in an isolation cell without clothing, bedding or articles of personal hygiene, defendant, Sergeant Bernard D. Smith (incorrectly sued as Sergeant V. D. Smith in Civil Action No. N-72-234), violated his constitutional right to be free from cruel and unusual punishment. Similarly, he alleged that defendant, Captain Robert Burrell (in Civil Action No. N-72-68), inflicted cruel and unusual punishment on him by placing him in a mental observation cell in the prison hospital with similar deprivations. The Court consolidated these cases for trial and decided them in a single opinion.[1] The Court dismissed the complaints because plaintiff had not enhausted his available administrative remedies with the Maryland Inmate Grievance Commission. The Court, however, also ruled on the merits of the complaints. It held that defendants had not deprived plaintiff of his constitutional rights and also that defendants were immune from liability for damages under section 1983 because they acted in good faith reliance on standard operating procedures.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed, holding that plaintiff need not exhaust his administrative remedies before suing under section 1983, and that defendants had violated his constitutional rights. The Court of Appeals held that Captain Burrell had violated plaintiff's eighth amendment rights by confining him in a cell under conditions that were *per se* violative of the eighth amendment. It also held that Captain Burrell violated plaintiff's eighth amendment rights by failing to comply with an administrative directive requiring that when an "inmate who is displaying mentally disturbed behavior [is] placed in an isolation cell for the inmate's own safety, or that of the inmate population. . . . [T]he psychologist/psychiatrist should be contacted immediately after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period." The Court of Appeals did not hold that

[1] The opinion is reported at 367 F. Supp. 1191.

the conditions in the isolation cell in which Sergeant Smith confined plaintiff violated the eighth amendment, but it did hold that Sergeant Smith also violated plaintiff's eighth amendment rights by failing to comply with the constitutional standard enunciated in the administrative directive. The appellate court indicated that the Constitution required not only immediate notification of a psychologist, but also alleviation of the prisoner's "deprivations and discomforts" caused by removal of his personal belongings, if medical attention is not forthcoming within a reasonable time.[2]

Despite holding that defendants violated plaintiff's constitutional rights, the Fourth Circuit did not impose liability on defendants because of the possible availability of a good faith defense. The Court of Appeals, however, rejected the District Court ruling that defendants had established a good faith defense by demonstrating compliance with the administrative directive and standard operating procedures and enunciated additional facts that defendants would have to establish to avail themselves of the good faith defense. According to the appellate decision, Sergeant Smith must establish:

(1) an explanation for his decision to confine plaintiff in an isolation cell rather than a mental observation cell;[3] and

[2] The Fourth Circuit, however, did not suggest how the prison guards could alleviate these "deprivations and discomforts" and still accomplish the admitted goal of the deprivations, to prevent the prisoner from injuring himself. One possibility is to have a prison guard constantly observe each prisoner who threatens to injure himself. Although this utopian practice would insure the safety of the prisoners, it is impractical because of the limited resources allowed prison administrators. Moreover, even if this procedure were normally possible, the skeletal crew available on the New Year's Day weekend would probably have prevented its use.

[3] This question relates to the statement in the administrative directive that: "Institutions that do not have mental observation cells may use the punitive or isolation cells for the purpose of housing inmates who are mentally disturbed, but only upon approval of a psychologist or psychiatrist."

(2) a reasonable understanding that his notification of the psychologist approximately 24 hours after plaintiff entered the isolation cell complied with the requirements of the administrative directive.

In regard to Captain Burrell, the Fourth Circuit addressed each of his constitutional violations separately. To avoid liability for the conditions in plaintiff's mental observation cell, Captain Burrell would have to establish that he "had a good faith belief that he was acting legally in placing McCray in the [mental observation] cell . . . ." *Id.* at 370-71. The Court of Appeals provided more extensive guidance concerning Captain Burrell's liability for failure to comply with the administrative directive. After stating that this Court must determine whether Captain Burrell had met his responsibilities, that court indicated that this Court's inquiry must include several questions:

(1) Whether Captain Burrell had a continuing duty to plaintiff after placing him in the mental observation cell?

(2) If so, whether he had a duty to determine that a psychiatrist had been summoned?

(3) What duty Captain Burrell had when the psychiatrist failed to respond within a reasonable time?

(4) Whether there were other more humane facilities to which plaintiff could have been transferred when the psychiatrist failed to respond?

The appeals court held that defendants had the burden of establishing the defense and suggested that an evidentiary hearing might be necessary to adduce additional evidence.

Factual Background

Following this suggestion the Court conducted an evidentiary hearing on May 13 and 20, 1977. Before relating the additional facts deduced from this hearing, it is beneficial to outline the factual background as determined in the Court's original decision.

On November 20, 1971, plaintiff complained of the unsanitary condition of his cell on the "street side" of the South Wing in the Maryland Penitentiary. Sergeant Smith, who had not previously met plaintiff, responded to this complaint by placing him in a different cell. While he was in this cell, plaintiff began screaming demands for his legal materials and his medicated shower. Sergeant Smith then removed plaintiff and placed him in an isolation cell. In the course of this transfer, plaintiff repeatedly threatened to injure himself, and Sergeant Smith decided to remove plaintiff's clothing and the mattress in his isolation cell. During the night he was provided a mattress. At the beginning of his shift the next day, Sergeant Smith inspected plaintiff's cell and discovered that he had smeared feces throughout his cell. He notified the psychologist and had plaintiff bathed and the cell scrubbed. Since plaintiff began acting normally, Sergeant Smith returned his clothes. He retained plaintiff in isolation for another day and then returned him to his cell in the South Wing on November 22.

The incident involving Captain Burrell began with a fire in plaintiff's cell on January 1, 1972. In an effort to douse the fire, plaintiff had broken both his sink and his toilet. Plaintiff was taken to the prison infirmary for treatment, which he initially resisted. Captain Burrell, who was responsible for the admininstration of the prison at the time, ordered plaintiff's confinement in a mental observation cell after he was informed that plaintiff had intentionally started the fire in his cell. Concerned that plaintiff might attempt to further injure himself, Captain Burrell removed plaintiff's clothes and mattress in his cell and deprived him of articles of personal hygiene. Plaintiff remained in the mental observation cell for approximately 48 hours, from January 1-3, 1972.

At the evidentiary hearing conducted May 13 and 20, 1977, the parties presented additional testimony directed at the questions propounded by the Court of Appeals. Several prison administrators discussed the intent of the

administrative directive. From this testimony the Court concludes that the directive governed the isolation of inmates under two distinct factual situations. Paragraph one permitted isolation of inmates who were emotionally disturbed in the isolation cells and did not require notification of a psychologist. Paragraph three permitted isolation of inmates who were mentally disturbed in the mental observation cells but required that a psychologist be notified immediately and that the inmate be evaluated within 24 hours.

SERGEANT SMITH

Sergeant Smith testified that he decided to place plaintiff in the isolation cell because his disruptive behavior indicated he was emotionally disturbed. He originally intended that plaintiff would be in isolation only for a "cooling-off" period. Plaintiff's threats to injure himself, however, convinced Sergeant Smith that he should remove plaintiff's clothing and mattress and deprive him of articles of personal hygiene that he could use to injure himself. He testified, and the Court accepts, that these precautions were standard operating procedure for protecting inmates who threatened themselves. As Sergeant Smith testified, however, these precautions were not premised on the conclusion that plaintiff was mentally disturbed. At the time he placed plaintiff in isolation, Sergeant Smith was unfamiliar with his proclivities. He was concerned about plaintiff's threats to himself, but he was aware that inmates often threaten to harm themselves when they have no intention of doing so. Based on these circumstances, he exercised his best judgment and concluded that plaintiff was emotionally, but not mentally, disturbed. Having reached this conclusion, Sergeant Smith interpreted the administrative directive as not requiring that he notify a psychologist.

The Supreme Court has enunciated a two-prong test for determining whether government officials are entitled to the qualified immunity provided by the good faith defense.

Wood v. Strickland, 420 U.S. 308 (1975).[4] The test imposes both a subjective and an objective standard. Defendants must establish not only that they had a good faith belief in the constitutionality of their actions, but also that the belief was reasonable. *Id.* at 321.

Sergeant Smith's behavior after confining plaintiff in isolation substantiates that he acted in good faith in determining that plaintiff was only emotionally disturbed and that he need not notify a psychologist. Before leaving work on November 20th, Sergeant Smith told his replacement that he could return plaintiff's clothes if his condition improved. He had no intention of depriving plaintiff of his clothes longer than necessary to insure his safety and believed that his behavior was merely a brief display, "an acting out"[5] of emotions. However, when Sergeant Smith discovered the feces in plaintiff's cell the next day, he concluded that plaintiff was unstable and notified the psychologist. By notifying the psychologist, Sergeant Smith demonstrated a willingness to comply with paragraph three of the directive when he believed that it was applicable. His failure to notify the psychologist on the first day of plaintiff's isolation was premised on his good faith belief that plaintiff was not mentally disturbed and that therefore paragraph three, requiring notification of a psychologist after isolating inmates displaying mentally disturbed behavior, was not applicable.

Furthermore, the Court concluded that Sergeant Smith's belief that plaintiff was not displaying mentally disturbed behavior was reasonable. The administrative directive provides no guidelines for determining whether an inmate

[4] Although *Wood* concerned school administrators, it is equally applicable to prison administrators. Knell v. Bensinger, 522 F.2d 720, 724 (7th Cir. 1975). *See* McCray v. Burrell, 516 F.2d 357, 371-72 (4th Cir. 1975) (addendum).

[5] "Acting out" denotes emotionally disruptive behavior. The witness testified that inmates often engage in such behavior to gain attention and annoy the prison staff.

is displaying mentally disturbed behavior. It does not state that prison guards can remove an inmate's clothing and mattress only if he is acting in a mentally disturbed manner or that such action compels the conclusion that he is displaying mentally disturbed behavior. It is also to be noted that Sergeant Smith did not have a background in psychology to assist him in evaluating a prisoner's behavior. He could only rely on his experience as a prison guard and exercise his best judgment. Indeed, plaintiff's release from isolation after only two days' confinement confirms Sergeant Smith's judgment that plaintiff was not mentally disturbed. His decision to remove plaintiff's clothing and mattress does not compel a contrary conclusion. It is fully consistent with Sergeant Smith's explanation that he believed plaintiff was only emotionally disturbed, but that he acted cautiously to avoid any possibility that plaintiff might injure himself.[6] He was aware that prisoner's threats to injure themselves are often empty, but he wished to take no chance.

The Court's conclusion is not undermined by the testimony of Major Clingenpeel, another prison official, that a hypothetical situation approximating plaintiff's behavior evidenced mentally disturbed behavior and required notification of a psychologist. It is always easier to evaluate a situation with hindsight. Furthermore, despite the detail of the hypothetical question, it could not completely recreate plaintiff's behavior as observed by Sergeant Smith.

Accepting Sergeant Smith's determination that plaintiff was not exhibiting mentally disturbed behavior, it is manifest that he acted in accordance with a reasonable belief in the legality of his actions. The administrative directive requires immediate notification of a psychologist only when an inmate displaying mentally disturbed

[6] The Court takes judicial notice that the instances in which prisoners injure themselves are not rare. Indeed, Captain Burrell testified that one prisoner, whom he had placed in isolation, hung himself.

behavior is placed in isolation. The directive does not require notification of a psychologist whenever a prison official orders removal of an inmate's clothing and mattress to prevent self-inflicted injury. Thus, Sergeant Smith's failure to notify the psychologist on November 20th did not violate the directive. Nor could the Court discover judicial decisions before 1972 endowing prisoners with an "unquestioned"[7] constitutional right to have a psychologist notified immediately whenever they are placed in an isolation cell without clothing, mattress or articles of personal hygiene.[8] Therefore, the Court finds that Sergeant Smith reasonably believed that neither the administrative directive nor the Constitution compelled notification of a psychologist after he placed plaintiff in an isolation cell.

The Court's factual determination that Sergeant Smith reasonably believed that plaintiff was not displaying mentally disturbed behavior diminishes the relevance of the questions advanced by the Court of Appeals. The questions assume that Sergeant Smith believed plaintiff was exhibiting mentally disturbed behavior.[9] Based on this assumption, the Court of Appeals questioned Sergeant Smith's decision to confine plaintiff in an isolation cell rather than a mental observation cell as required for mentally disturbed inmates. Although Sergeant Smith provided an explanation for his decision even assuming that plaintiff was acting mentally disturbed,[10] his conclusion that plaintiff was not acting mentally disturbed

[7] In *Wood* the Court stated that official immunity would require permissible intentions and observance of the students' unquestioned constitutional rights. 420 U.S. at 321.

[8] Indeed, this Court and three judges on the Court of Appeals were unfamiliar with this rule even in 1975. The Court is reluctant to hold Sergeant Smith to a higher standard.

[9] Although this assumption may have been reasonable at the time the Court of Appeals rendered its decision, the Court believes that the evidence presented at the additional hearing compels a different conclusion.

[10] Sergeant Smith testified that he had no authority to place inmates in the mental observation cells.

undermines the basis for the appellate inquiry, since the directive permitted confinement in the isolation cells for inmates who were not acting mentally disturbed. Similarly, Sergeant Smith's understanding of the requirement that a psychologist be notified immediately has no relevance in light of the Court's finding that Sergeant Smith reasonably believed that plaintiff was not displaying mentally disturbed behavior. The requirement of immediate notification of a psychologist applies only if the inmate is believed to be displaying that behavior.

For the above reasons, the Court holds that Sergeant Smith has established a good faith defense and therefore is immune from damages under section 1983.

CAPTAIN BURRELL

Captain Burrell has established his good faith defense even more conclusively. Captain Burrell testified that at the time he confined plaintiff in the mental observation cell he did not believe plaintiff needed psychiatric care. Believing that plaintiff had started the fire in his cell, however, he decided to employ every precaution to prevent plaintiff from injuring himself again.[11] Consequently, he removed plaintiff's clothing and mattress and deprived the plaintiff of articles of personal hygiene. The Court finds that Captain Burrell exercised his best judgment in good faith in determining that plaintiff did not require psychiatric assistance. Furthermore, for the reasons stated above in regard to Sergeant Smith, the Court finds that neither the administrative directive nor the principles of constitutional law applicable at the time of the incident render Captain Burrell's conclusion unreasonable.

Even assuming that Captain Burrell believed that plaintiff was exhibiting mentally disturbed behavior and required psychiatric treatment, the Court finds that he acted in good faith and with a reasonable belief in the

[11] This overabundance of caution probably resulted from a previous experience in which a prisoner, whom Captain Burrell had placed in isolation, hung himself.

legality of his actions. Captain Burrell testified that he relied on the statement of Nurse Weber, who treated plaintiff, that she would notify a doctor. It was reasonable for him to assume that the nurse and doctor would assure that plaintiff would receive proper treatment, both medical and psychiatric. The testimony of both Major Svend Hansen and Major Forrest Clingenpeel supports this conclusion. Major Hansen testified that when a correctional officer orders an inmate to the hospital, it is the obligation of either the senior correctional officer or the hospital staff to call a psychologist if one is necessary. Major Clingenpeel stated that when an officer isolates an inmate in the mental observation cells in the hospital the medical staff has the responsibility under the directive to notify the psychologist. Although Nurse Weber interpreted the directive differently, her testimony was indecisive. The weight of the evidence compels the conclusion that Captain Burrell acted in good faith and with a reasonable belief in the legality of his actions in relying on the nurse to summons a psychologist.

Furthermore, the testimony at the hearing satisfactorily answered each of the questions posed by the Court of Appeals. Captain Burrell did not have a continuing duty toward plaintiff after he placed him in the observation cell. As Major Clingenpeel testified, the medical staff had the responsibility of notifying the psychologist about inmates in the mental observation cells. Since the second question was contingent on an affirmative answer to the first, it need not be answered. In any case Major Clingenpeel also testified that Captain Burrell had no continuing obligation to determine if a psychologist had been summoned. Nor did Captain Burrell have any duty to respond when the psychologist failed to arrive to treat plaintiff within a reasonable time. This finding logically derives from the prior findings that Captain Burrell did not have initial responsibility for either notifying the psychologist or determining that he had been notified. It also comports with the administrative directive which does not state who has the obligation to act if the psychologist does not arrive

within a reasonable time. Finally, the Court finds that, as Captain Burrell testified, there were no less oppressive facilities to which he could have transferred plaintiff when a psychologist failed to arrive.[12] Plaintiff suggested no alternative facilities to controvert Captain Burrell's testimony.

Captain Burrell also is immune from liability in damages for the unconstitutional conditions in plaintiff's cell. Captain Burrell testified that he confined plaintiff in the mental observation cell to prevent him from further harming himself or other inmates. The Court accepts this testimony and finds that Captain Burrell acted in good faith with no intention to injure plaintiff and with the belief that his actions were proper.

Furthermore, the Court finds that Captain Burrell's belief in the legality of his actions was a reasonable one. The United States Court of Appeals for the Tenth Circuit, in a case involving quite similar circumstances, held that prison officials were not liable for damages because they were entitled to official immunity. *Poindexter v. Woodson,* 510 F.2d 464 (10th Cir. 1975), *cert. denied,* 423 U.S. 846 (1976). In *Poindexter* the prison officials had confined inmates in "strip" cells for periods ranging from 4-16 days without clothing or articles of personal hygiene. *Poindexter v. Woodson,* 367 F. Supp. 443, 452-54 (D. Kan. 1973). The dimensions of the strip cells were approximately nine feet long, five feet wide and eight feet high. *Id.* at 452. The walls and the floor were bare concrete and often were covered with human excrement. *Id.* at 452-53. The cells contained neither a bed nor any washing facilities and apparently lacked heating. *Id.* The only toilet was a hole in the floor covered by a grate, which the inmate could not

[12] The Court assumes that in propounding this question the Court of Appeals was excluding the alternative facilities of which it was aware, i.e., plaintiff's cell in the South Wing and the isolation cells, and the obvious possibility of returning plaintiff's clothing and mattress. These are not true alternatives because they would not serve as well the goal of preventing plaintiff from harming himself or others.

flush. *Id.* at 452. The cells were used for inmates with mental or disciplinary problems. *Id.* The District Court held that these conditions violated the eighth amendment prohibition against cruel and unusual punishment. *Id.* at 458. The District Court further held, however, that the prison officials were immune from liability for damages because they had established an official immunity defense. *Id.* at 462-63. (*Poindexter,* Supplemental Memorandum). In affirming this holding, the Court of Appeals emphasized that the incidents occurred shortly after a prison riot, that the appropriate authorities authorized the design of the cells pursuant to statute, and that no court with jurisdiction over defendants had held that use of the cells constituted cruel and unusual punishment. 510 F.2d at 465, 466.

The facts in this case concerning both the conditions in the mental observation cell[13] and Captain Burrell's belief in the legality of his actions are very similar to those in *Poindexter.* When Captain Burrell placed plaintiff in isolation, he was also operating under difficult prison conditions, although not quite as severe as those in *Poindexter.*[14] Because of the New Year's Day holiday, he was operating with only a skeletal crew in quelling the disturbance caused by plaintiff.[15] 367 F. Supp. at 1191. In addition, Captain Burrell was acting with the apparent approval of prison authorities in using the mental observation cells.[16] It was reasonable for Captain Burrell to assume the legality of the facilities provided by the State. Furthermore, the administrative directive fostered this

[13] A description of the conditions in the mental observation cell can be found in the Court of Appeals' opinion. 516 F.2d at 369.

[14] Correspondingly, Captain Burrell did not retain plaintiff in isolation for nearly as long as the inmates in *Poindexter* were retained.

[15] The holiday weekend probably also explains the unavailability of the psychologist.

[16] The Court is unaware of any Maryland statute or prison regulation that would contradict this approval.

belief by sanctioning and, indeed, compelling the use of the mental observation cells under certain circumstances. Although the use of these cells did not necessarily include removal of an inmate's clothing and mattress, such precautions were standard operating procedure. Finally, the Court is unaware of any court with jurisdiction over Captain Burrell that had held prior to 1972 that conditions similar to those in plaintiff's mental observation cell were unconstitutional. Indeed, the reported decisions available in 1972 provided little guidance concerning the legality of Captain Burrell's behavior. Although several cases had held that conditions in certain isolation cells were unconstitutional, most of these cases did not involve temporary, non-punitive isolation to prevent the inmate from harming himself or other inmates. *See, e.g., Ford v. Bd. of Managers,* 407 F.2d 937 (3rd Cir. 1969) (five-day confinement in strip cell for threatening prison security); *Wright v. McMann,* 387 F.2d 519 (2d Cir. 1967) (33-day confinement in strip cell for violating prison regulations); *Jordan v. Fitzharris,* 257 F. Supp. 674 (N.D. Cal. 1966) (12-day confinement in strip cell for disciplinary violation).

Admittedly, two cases did indicate that even temporary, non-punitive isolation in conditions similar to plaintiff's mental observation cell would constitute cruel and unusual punishment. *See Landman v. Royster,* 333 F. Supp. 621, 648 (E.D. Va. 1971);[17] *Hancock v. Avery,* 301 F. Supp. 786, 792 (M.D. Tenn. 1969). These two District Court opinions, however, hardly establish an unquestioned constitutional principle, especially in light of contrary indica-

[17] In *Landman,* however, the court indicated that such confinement might be permissible if authorized by a doctor to prevent self-inflicted injury. 333 F. Supp. at 648. Furthermore, although the *Landman* court held that defendants did not establish a good faith defense, it did so on the basis of circumstances that are not present in this case. The court relied on the peculiarly offensive nature of some of defendants' acts and a prior warning by the Fourth Circuit concerning the cruel conditions in the cells in question. *Landman v. Royster,* 354 F. Supp. 1302, 1318 (E.D. Va. 1973).

tions from other courts. For example, in *Wright v. McMann*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972), the court tacitly approved regulations permitting the removal of lights, toilets, beds, washstands and mattresses from psychiatric observation cells if there was imminent danger that the inmate would destroy them or use them to harm themselves.[18] *Id.* at 131. In a previous opinion concerning the same case, the court also had accepted that precautions similar to those taken by Captain Burrell might be necessary in certain circumstances. After stating that removing an inmate's clothes, exposing him to bitter cold and depriving him of basic elements of hygiene violated civilized standards of human decency, the court, in a footnote, stated that it did "not rule out the possibility that in exceptional circumstances it might be necessary to take from a prisoner all objects with which he could harm himself or others." *Wright v. McMann*, 387 F.2d 519, 526 n.15 (2d Cir. 1967). Furthermore, this Court in *Roberts v. Pepersack*, 256 F. Supp. 415, 419, 431 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967), had held that solitary confinement in conditions similar to plaintiff's mental observation cell was not unconstitutional.

As this discussion demonstrates, judicial opinion concerning the temporary isolation of prisoners to prevent self-inflicted injury was scarcely monolithic or well-defined when Captain Burrell acted in 1972. In addition, the Court notes that the laws governing prisons and prisoners were rapidly changing during this period as the courts began to discard the restraint that had characterized previous judicial thought. *See Landman v. Royster*, 354 F. Supp. 1302, 1317 (E.D. Va. 1973). For these reasons, the Court finds that Captain Burrell's belief in the legality of his actions was reasonable.

Therefore, the Court holds that Captain Burrell is not liable for damages for confining plaintiff in the mental observation cell.

[18] In this case plaintiff had destroyed his sink and toilet before Captain Burrell confined him in the mental observation cell.

For the foregoing reasons, the Court will enter separate judgments for defendants in accordance with this opinion.

EDWARD S. NORTHROP,
Chief United States District Judge.

Dated: August 16th, 1977.

McCray v. Burrell, et al., 516 F.2d 357 (4th Cir. 1975)

WINTER, Circuit Judge:

These appeals present the common question of whether a prisoner, incarcerated under state process, is required to exhaust available state remedies before the district court may or should exercise jurisdiction in a suit under 42 U.S.C. § 1983 for the redress of alleged deprivations of civil rights arising out of his incarceration. Some of these appeals were heard but not decided by a panel of the court. Because each presents the same question of exceptional importance, we consolidated them and heard them in banc.

In No. 74-1042 and No. 74-1043, plaintiff McCray, an inmate of the Maryland Penitentiary, sought relief under § 1983 for deprivations of liberty without due process of law and for imposition of cruel and unusual punishment arising out of two separate incidents in which he was allegedly placed naked in an isolation cell for a period of 48 hours. In No. 74-1042, he sought only compensatory and punitive damages. In No. 74-1043, his inartfully drawn *pro se* complaint may be read to seek injunctive relief as well as damages. Both cases were consolidated in the district court and tried nonjury. The district court dismissed both complaints with prejudice. The district court found that before suing under § 1983, McCray was required to exhaust the state administrative remedy established by the Maryland Inmate Grievance Commission Act, 4A Ann. Code of Md., Art. 41, § 204F (1973 Cum. Supp.), through which he could have obtained relief for the deprivation of his constitutional rights; and that since

McCray had not exhausted his remedies under that statute he was not entitled to federal relief. McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973). On the merits, it found that no constitutional violations had occurred in the incidents alleged; that each defendant in the incident in which he was concerned, had acted in good faith reliance upon standard operating procedures and, hence, was immune from liability in damages.

516 F.2d at 359-360.

* * * * * *

(Portions of this Opinion unrelated to this issue have been omitted.)

II.

McCray's suits against Sergeant Smith, a prison guard at the Maryland Penitentiary, and Captain Burrell, the duty captain in charge of all guards at the Maryland Penitentiary, who described himself as responsible for the entire institution including control and security (but not medical care) of the hospital, arose out of incidents occurring at those institutions on or about November 20, 1971, and January 1, 1972, respectively. The testimony with regard to both incidents was largely conflicting. The district court made extensive findings of fact, resolving questions of credibility, and we accept those findings. We disagree, however, with the legal conclusions to be drawn therefrom. The facts need not be restated in great detail in view of the district court's detailed recitations in its opinion. *See* McCray v. Burrell, 367 F. Supp. 1191, 1210 et seq.

A. *No.74—1043—McCray v. Smith*

On or about November 20, 1971, McCray was moved from his regular cell because of his complaint about unsanitary conditions. Sergeant Smith, who had never met McCray before, ordered his removal, had him showered and deloused and placed him in another cell on a different tier. The warden instructed Smith to provide

McCray with his law books and legal materials which were kept in his regular cell. When they were not provided to him at once, McCray began a substantial vocal disturbance. Additionally, the screaming McCray tore a locker off the cell wall and banged it repeatedly against the wall.

Sergeant Smith determined that McCray should be removed from this cell and placed in the isolated confinement (I.C.) area, cell No. 5. As found by the district court, "this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates." 367 F.Supp. at 1211. While McCray was being removed, again, as found by the district court, he "began shouting insults and threatening to do bodily harm to himself." *Id.* Smith, treating these threats as an indication of mental and emotional instability, directed that McCray be placed in isolated confinement without any clothes or bedding. This was done to protect McCray from harming himself.

McCray was placed nude in the cell about 11:30 a.m., November 20. The cell, itself, was quite long and narrow with a high ceiling. The walls, ceiling and floor were all concrete and there was a one-foot high concrete slab, six to eight feet long and three feet wide, which was McCray's bed. Although, initially, McCray was furnished no blankets or other bedding, during the night a prison guard gave him a mattress. McCray testified that it was so cold that he tore open the mattress, which was old and deteriorated, and dug a channel down in the cotton so that he could sleep nestled in the mattress. Subsequently, McCray was disciplined for destroying the mattress.

The cell containced a toilet and a sink. The record does not show whether the cell had a window, but evidence was offered that there was a light bulb recessed in the rear wall. The cell had two doors—the inner one composed of bars, and the outer one made of solid wood but not closed. McCray was given no materials with which to clean himself or the cell, and he was fed in plastic cups. He was deprived of reading and writing materials.

The next morning Sergeant Smith returned to check on McCray and found that he had defecated into a cup and smeared feces over himself and the cell wall. Accordingly Smith decided not to return him to his former cell. Instead, he had McCray bathed and the cell scrubbed, and then returned McCray to I.C. cell No. 5 for another twenty-four hours. It was not until that time that Smith caused notice to be given to a psychologist or psychiatrist in accordance with the applicable written administative directive which had become effective August 10, 1970. The directive stated that "an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified . . ." and directed that the *"psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period."* (Emphasis added.) By its terms, the directive permitted the placing of inmates displaying mentally disturbed behavior in a punitive or isolation cell when the institution lacks a mental observation cell and a psychologist or a psychiatrist approves the lodging of such an inmate in an isolation cell.

The next day, November 22, McCray, according to Smith, "started acting alright." He was then returned to his regular cell on the third tier. We infer that McCray's clothes were not returned to him until this time. The record on appeal does not show that he was ever evaluated by a psychologist or a psychiatrist.[2]

B. *No. 74—1042—McCray v. Burrell*

On or about January 1, 1972, McCray was again removed to another cell. A fire broke out in McCray's cell, according to McCray, accidentally, but in the belief of Captain Burrell, by design. In either event, McCray was

[2] Sergeant Smith implied that the psychologist, one Dr. Musk, did see McCray. Dr. Musk testified that he could not report whether he had talked to McCray at this time. He said he would "most probably" have recorded such a visit, but often did not.

burned. Not without difficulty, the guards extinguished the fire and conveyed McCray to the dispensary where, despite McCray's resistance, the nurse on duty treated his burns. The nurse suggested that McCray remain in a locked cell in the hospital. At a later date, McCray was disciplined for setting fire to his cell.

Captain Burrell, who was present when McCray was treated, not unreasonably believed that McCray had set the fire. Since he concluded that McCray was mentally unstable, he decided, despite the nurse's suggestion, to place McCray in a mental observation (M.O.) cell, again without clothes or a mattress or other bedding. McCray was placed in the M.O. cell at about 9:45 a.m., January 1, and released about 8:00 a.m., January 3. At about the time he was treated in the dispensary, the nurse, purportedly acting in accordance with the written directive to which reference has been made, contacted a physician and informed him that McCray was placed in M.O. The physician told her to communicate with another doctor, whom she was unable to reach, and McCray was not seen by a physician until January 4, 1972.

The M.O. cell in which McCray was placed was described by Captain Burrell as a bare cell. The windows were covered with sheet metal, but the cell had an electric light. The cell had concrete walls, a concrete ceiling, and a tile floor. There was no sink, and the only sanitary facility was an "oriental toilet" — a hole in the floor, six to eight inches across, covered by a removable metal grate which was encrusted with the excrement of previous occupants. The "toilet" flushed automatically once every three to five minutes. McCray was not permitted to bathe, shave or have or use articles of personal hygiene, including toilet paper. He was not afforded reading or writing materials. He claimed that during the forty-six hours he spent in this confinement "it was impossible to sleep . . . I stood up most of that [first] night, the floor was cold."

III.

[4] The district court held that plaintiff's confinement "in both cases for forty-eight hours was not an unreasonable period when one considers the surrounding circumstances in each case," 367 F. Supp. at 1215, and that "the defendant's actions were not excessive exercises of authority beyond the limits of civilized standards of decency . . . they [were not] intended as punishment for the plaintiff's conduct . . . they were employed as precuationary measures . . . the removals . . . to isolated cells were not pointless impositions of suffering . . . there [was not] a less severe alternative that would have achieved the purposes for which the confinement was imposed," 367 F. Supp. at 1216. While we accept the district court's findings that McCray's confinements in isolated cells were not intended as punishment but for mental observation and as a precaution against a not unreasonable fear that McCray might harm himself, we are constrained to conclude that McCray's eighth amendment right not to be subjected to "cruel and unusual punishments" was violated.

[5, 6] As articulated in Trop v. Dulles, 356 U.S. 86, 100-01, 78 S. Ct. 590, 597, 2 L. Ed. 2d 630 (1958), "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," therefore the punishment imposed must be justified in light of the "evolving standards of decency that mark the progress of a maturing society." The eighth amendment is, of course, made applicable to the states through the fourteenth amendment. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947).

[7] It may be argued that, if the findings of the district court are accepted, McCray's claims do not raise eighth amendment questions, because McCray was isolated not for purposes of punishment but for the more humane and not unreasonable purpose of protecting him from self-

harm, until an expert evaluation of his mental condition could be made and proper therapeutic steps taken if they were indicated. But the answer is that isolation of McCray occurred within a prison context. His jailers had the power to isolate him because he had been committed to their custody as punishment imposed pursuant to a judicial determination that he had engaged in criminal conduct. His confinement, in whole and in part, was punishment for his misdeeds. Thus, all of his confinement was subject to the restrictions of the eighth amendment. *Cf.* Howard v. Smyth, 365 F.2d 428, 429-30 (4 Cir. 1966), cert. denied 385 U.S. 988, 87 S. Ct. 599, 17 L. Ed. 2d 449 (1966). If anything, the fact that McCray was isolated within the prison for nonpunitive purposes strengthens his case because special disciplinary reasons may not be offered in possible justification for the conditions in which he was kept.

[8] A. In McCray's suit against Smith, we think that a violation of the eighth amendment has been shown.[3] The conditions of confinement in I.C. cell No. 5 came perilously close to a denial of eighth amendment rights in and of themselves, but the record is not sufficiently complete that we rest our decision on this ground. The cell did contain a toilet and a sink, although we do not know if either could be operated by McCray from within the cell or whether a

[3] We perceive that two tests for violations of the eighth amendment are relevant in the cases before us. First, are the conditions of punishment sufficiently "shocking" that they amount to "cruel and unusual" punishment? *See, e. g.*, Landman v. Royster, 354 F. Supp. 1302, 1318 (E.D. Va. 1973). Second, does the punishment constitute some rational means to reach a permissible end or is it, instead, arbitrary, Howard v. Smyth, 365 F.2d 428, 431 (4 Cir. 1966), unreasonable, Almond v. Kent, 459 F.2d 200, 204 (4 Cir. 1972), or unnecessary, Weems v. United States, 217 U.S. 349, 370, 30 S. Ct. 544, 54 L. Ed. 793 (1910)? The district court phrased this second test as requiring that there not be "a less severe alternative that would have achieved the purposes for which the confinement was imposed," 367 F. Supp. at 1216, and its phraseology does not seem inaccurate to us. *See also* Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971).

guard was available to render them operative where their use was indicated. McCray was deprived of essential articles of hygiene, although conceivably there could have been a good faith belief that he might harm himself if permitted access to such seemingly innocuous articles as a bar of soap or a toothbrush. McCray was also deprived of heat, clothes and blankets, and he was furnished only a deteriorated mattress in which he scooped out a resting place for himself. The record, however, does not disclose the temperature in McCray's cell or whether McCray was able to capture adequate sleep under these primitive conditions.

What is clear, however, is that if McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant, if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment. The written directive for operation of the place of confinement states specifically that when an "inmate who is displaying mentally disturbed behavior" is "placed in an isolation cell for the inmate's own safety, or that of the inmate population," the "psychologist/psychiatrist should be contacted *immediately* after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period" (emphasis added). Evidently McCray was never examined during this confinement, but Sgt. Smith can hardly be held as a guarantor that the psychologist/psychiatrist whom he does not command will carry out his duties under the directive. Sgt. Smith, however, is accountable for his duty to notify, or to cause to be notified, the psychologist/psychiatrist *immediately* after McCray's isolation. By his own admission, Smith did not seek expert professional help until nearly twenty-four hours after he isolated and stripped McCray.

[9] On this record, we conclude that McCray's conditions of confinement *per se* do not mount up to a denial of his rights under the eighth amendment. We have no doubt

that a prisoner evidencing mental derangement in a form suggestive of self-harm or harm to others may and should be removed from the general prison population until his true condition can be assayed by those competent to evaluate him; and, until his examination and the formulation of an expert opinion, he may be subjected to protective measures. In permitting such confinements, the prison directive comports with the eighth amendment. But, when the protective measures take the form of isolation, nude, in I.C. cell No. 5, we believe also that the administrative directive states the constitutional minimum in requiring that a "psychologist/psychiatrist . . . be contacted immediately after the confinement of the inmate, and the inmate . . . evaluated within a twenty-four (24) hour period." If compliance with the directive is not forthcoming, the guarantee of the eighth amendment has been denied, and, as we shall presently hold, if expert medical help is not forthcoming within a reasonable period of time, the deprivations, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided.

[10] B. In McCray's suit against Burrell, we perceive two violations of the eighth amendment. First, the record reveals that the conditions of confinement in the mental observation (M.O.) cell in which McCray was kept fall far short of the current standards of decency of present-day society. McCray was kept naked in a barren cell without blanket or mattress and with nowhere to sit, lie or lean except against bare concrete or bare tile. He had no sink or running water; his only toilet was a hole in the floor, the cover of which was encrusted with human excrement. He was denied all articles of personal hygiene.[4] Society would

[4] Many other cases have singled out the deprivations suffered by McCray in overall holdings that cell conditions violate the eighth amendment: unsanitary cell conditions and lack of items with which to clean oneself, LaReau v. MacDougall, 473 F.2d 974, 978 (2 Cir. 1972), cert. denied, 414 U.S. 878, 94 S. Ct. 49, 38 L. Ed. 2d 123 (1973); inadequate heat, Wright v. McMann, 460 F.2d 126, 129 (2 Cir. 1972); Landman v. Peyton, 370 F.2d 135 (4 Cir. 1966); two and one-half days of isolated confinement,

hardly tolerate such confinement for a suspected mental patient, not convicted of crime; we cannot conceive that decent society would tolerate it even for a suspected mental patient who had been convicted of crime. The conditions of this confinement constitute a *per se* violation of the eighth amendment. *See* Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

[11] The second violation is identical to the violation in McCray's case against Smith — noncompliance with the constitutionally minimum requirements of the written directive concerning isolation of mentally disturbed inmates. As found by the district court, Captain Burrell took steps to comply with the institution's written directive to obtain promptly the services of an expert to evaluate McCray's condition at or about the time that he ordered McCray's special confinement. Like Sergeant Smith, Captain Burrell was not a guarantor that the expert attention would be immediately forthcoming, and it may well be that, as suggested by the district court, the directive was not fully carried out because McCray's second confinement occurred over the New Year's Day holiday. But Captain Burrell was not just a prison guard; he was captain of the guards. Even if we assume that the conditions of isolated confinement were constitutionally permissible, it was incumbent on Captain Burrell, if expert medical attention was not forthcoming in a reasonable period of time, to devise and employ means to protect McCray from injury to himself other than continued isolation with deprivation of clothing and elements of personal hygiene.

IV.

Although in the McCray cases we conclude that the treatment afforded McCray amounted to a denial of his rights under the eighth amendment, it does not necessari-

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Knuckles v. Prasse, 302 F. Supp. 1036, 1062 (E.D. Pa. 1969), aff'd per curiam, 435 F.2d 1255 (3 Cir. 1970), cert. denied, 403 U.S. 936, 91 S. Ct. 2262, 29 L. Ed. 2d 717 (1971), reh. denied, 404 U.S. 877, 92 S. Ct. 33, 30 L. Ed. 2d 125 (1971).

ly follow that McCray is entitled to damages and injunctive relief against Smith or that he is entitled to an award of damages against Burrell. The district court held that "since the defendants, as shown from all the facts, acted in good faith in exercising their discretion . . . they are immune from suit under 42 U.S.C. § 1983." 367 F. Supp. at 1217. Although the cases must be remanded, we do not foreclose the possibility that both Smith and Burrell may again be held immune from damages.

[12] Our prior decisions establish that when a prison guard acts in reliance on a good faith belief that what he is doing is constitutionally permissible, he is immune to damages as a consequence of his action even if it should be later established that his belief was ill-founded. Skinner v. Spellman, 480 F.2d 539 (4 Cir. 1973). *Cf.* Eslinger v. Thomas, 476 F.2d 225 (4 Cir. 1973); Hill v. Rowland, 474 F.2d 1374 (4 Cir. 1973). In applying the test, however, the district court seemed to conclude that because the defendants appeared to have complied with both the substance of the written directive with regard to the isolation of prisoners suspected if mental illness and the "normal operating procedure" of removing the clothing of "a prisoner who had exhibited an unstable mental and emotional state," 367 F. Supp. at 1217, immunity to damages followed as a matter of course. We do not perceive that the immunity doctrine may be applied in this fashion. Additional findings must be made before it may be properly concluded that defendants are immune, and it may be necessary to adduce additional evidence for those findings to be made.

[13] Most important, defendants may not avail themselves of the defense until they have proved that they had a good-faith belief in the legality of what they did. Since what is sought to be proved is a matter of defense, the burden of proof is upon them. In order to sustain that burden, we perceive certain subsidiary facts that must be established.

[14] A. In the case of Smith, first, a satisfactory explanation must be offered of his directions that McCray be isolated in the I.C. area, rather than an M.O. cell. It is true that the written directive permitted a disturbed prisoner to be isolated in an I.C. cell in an institution which was lacking M.O. facilities, but it appears that McCray's subsequent isolation by Burrell was in an M.O. cell, albeit one more primitive than the I.C. cell in which Smith placed McCray, so that it can be inferred that the Maryland penitentiary was not an institution lacking in M.O. facilities.

[15] Second, the written directive, purportedly followed by Smith, explicitly stated that the "psychologist/psychiatrist should be contacted *immediately* after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period" (emphasis added). As we have said, Smith cannot be held to the requirement of evaluation within twenty-four hours, but this provision gives meaning to the use of the word "immediately" in the preceding clause, and the record is clear that Smith took no steps to notify a psychologist or psychiatrist until the initial twenty-four hours of confinement had almost expired. In order to avail himself of the defense, it will therefore be incumbent on Smith to present proof which establishes by a preponderance of the evidence that the time within which he gave the notice complied with his reasonable understanding of the administrative direction of "immediately."[5] In this connection, the district court found that prison procedures required Smith to notify his superior immediately after isolating an inmate and that Smith was not shown to have failed to notify his superior. The district court misplaced the burden of proof. The

[5] On remand the evidence may show that Smith discharged his duty by notifying a superior whom he reasonably expected would properly notify a psychologist or psychiatrist. Indeed, it may even appear that the superior gave such notice. In either event, if the proof further shows that standard operating procedures of the prison permitted this form of notification as compliance with the administrative directive, Smith could still be immunized from liability by the defense.

immunity defense is for Smith to prove, not McCray to disprove.

B. In Burrell's case, we have held that the conditions of the M.O. cell in which McCray was confined were *per se* such as to violate the eighth amendment. But this is not to say that if Burrell had a good-faith belief that he was acting legally in placing McCray in the M.O. cell, he was liable for damages for this violation. However, Burrell's good faith in this regard remains to be established if liability is to be avoided.

[16] We have also held that the eighth amendment was violated when the administrative directive was not followed. But Burrell may not be responsible for this noncompliance. The district court must examine the scope of Burrell's duties and the extent of his responsibilities and determine that they were fully net before liability may be excused. This will include a consideration of the following, among others: Did Burrell have a continuing duty toward McCray after placing him in an M.O. cell? If so, did he have a duty to determine that a psychiatrist or psychologist had in fact been summoned? What duty, if any, did Burrell have when a psychiatrist or a psychologist failed to respond in a reasonable period? Were there other, more humane facilities to which McCray could have been transferred when a psychiatrist or psychologist failed to respond?

V.

Finally, we consider McCray's contention that he was improperly denied a jury trial in his suits against Smith and Burell. We perceive no error.

McCray made no demand for a jury trial when he filed his *pro se* complaints on January 19, 1972, and February 9, 1972, in No. 74-1042, and on March 7, 1972, in No. 74-1043. Counsel was appointed to represent him in March 1972 and substitute counsel was appointed on or about December 8, 1972. The first request by McCray for a jury trial was made orally in open court on June 11, 1973.

[17, 18] McCray's request was both untimely and not in writing as required by Rule 38(b), F. R. Civ. P. As such it constituted a waiver of trial by jury, rule 38(d). Of course the district court had discretion to grant the request, in whole or in part, notwithstanding, Rule 39(b), but we cannot say that there were such exceptional circumstances that the failure to grant the oral motion was an abuse of discretion. General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 197-98 (4 Cir. 1964), cert. denied, 377 U.S. 952, 84 S. Ct. 1629, 12 L. Ed. 2d 498 (1964).

Accordingly, in Nos. 74-1042 and 74-1043, we reverse the judgments of the district court and remand the cases for further proceedings in accordance with the views expressed herein.

Reversed and remanded.

516 F.2d at 365-371.

McCray v. Burrell, 367 F. Supp. 1191 (D. Md. (1973)
(Portions of the Opinion unrelated to this issue
have been omitted.)

* * * * * *

II.

MERITS

Q. [6] The complaints in both of these actions invoke jurisdiction of the Court pursuant to 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983, and the Constitution of the United States of America. Plaintiff alleges in both cases that the acts of the defendants unconstitutionally deprived him of his right to be free from physical abuse and cruel and unusual punishment as guaranteed by the eighth and fourteenth amendments to the Constitution. He further contends that in both cases this abuse and punishment was arbitrarily imposed in violation of the due process clause of the fourteenth amendment. He also charges that Captain Burrell acted to deny him proper

medical care following injuries allegedly received in a fire in his cell.

The testimony in both of these cases, as in most prisoner complaints of this type, is in conflict. While a general picture of the circumstances did develop, the question of liability hinges on the credibility of the witnesses. The Court as the trier of the facts must consider not only the evidence introduced, but also must evaluate the demeanor of the witnesses to determine their credibility. The contradictory statements of the plaintiff during the trial of these cases considerably diminished his credibility. One obviously blatant false assertion occurred after he had informed the Court that he had lost count of how many cases he had pending before the various judicial forums in the State. In response to a question posed by the Court, Mr. McCray stated that he never files complaints in more than one court based on the same cause of action. After the conclusion of the trial, it came to the Court's attention that the plaintiff had filed a suit in the Superior Court of Baltimore City alleging the same constitutional deprivations as are involved in Civil No. 72-68-N (Milton McCray v. Captain Burrell). While the defendant in 72-68-N is Captain Burrell, and the suit filed in the Superior Court is against the Warden of the Maryland Penitentiary, 72-68-N was amended at the time of trial by the plaintiff eliminating the Warden and the Penitentiary Medical Staff as defendants. Clearly this indicates, contrary to the plaintiff's contention at trial, that he does attempt to litigate the same causes of action simultaneously before more than one forum. A copy of the original complaint filed in 72-68-N, and a copy of the complaint filed in the Superior Court are included as appendices to this opinion.

The factual situations in both cases center on disruptive incidents involving the plaintiff, and a determination by the defendants that he be placed in an isolated cell without clothes or a mattress. In Milton McCray v. Sgt. V. D. Smith, (Sgt. Bernard D. Smith) Civil No. 72-234-N, the plaintiff alleged that on November 20, 1971, while he was

confined on the Maryland Penitentiary's South Wing (a wing used to house inmates who have violated prison regulations), Sgt. Smith removed him from his cell, and placed him in the isolated confinement area (I.C., known to the inmates as the "hole") for approximately two days.

The plaintiff was on the South Wing between November 17 and November 20, 1971. Prior to November 20th, Sgt. Smith had never met McCray. Plaintiff admitted that on November 20, 1971 he was placed in a cell on the "street side" of the South Wing, but that he asked to be moved to another cell when he discovered that the cell was in an unsanitary condition (he alleged that there were lice in the cell). Sgt. Smith then came to McCray's cell and took him to the "flats" (the lowest tier on the South Wing). Plaintiff was then given a shower and was deloused, and Sgt. Smith was told by the Warden of the Penitentiary to provide the plaintiff with his law books and legal materials while he was on the South Wing. However, these orders were not complied with because, according to the unrefuted testimony of the defendant, the process of packing and moving personal belongings could take from two to three days to complete. The Court notes at this juncture that there was testimony during the course of these trials that the Penitentiary has been forced to operate with a substantial shortage of prison personnel.

After the plaintiff had been placed in a cell on the fourth tier, "yard-side," of the South Wing, he began "hollering and yelling," demanding his legal materials and his medicated shower. Apparently this disturbance, which was quite substantial according to testimony of both the plaintiff and the defendant, prompted Sgt. Smith to remove McCray from the South Wing and place him in the isolated cell area. Clearly this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates.

While the defendant was transferring the plaintiff from his cell on the South Wing to the I.C. area, McCray began

shouting insults and threatening to do bodily harm to himself. Interpreting these threats as an indication of mental and emotional instability, and having personal knowledge of prior incidents involving inmates in isolation who had committed suicide, Sgt. Smith decided to strip McCray and remove the mattress from the cell. He testified that he felt it was better to subject the plaintiff to some discomfort than to risk that he might attempt to kill himself.

The cell in which McCray was placed, I.C. #5, was about 4-5 feet wide, 12-16 feet long and 12 feet high. It had four concrete walls, a concrete ceiling and a concrete floor. At the front of the cell was a solid, metal door and a barred, grill-type door, either or both of which could be closed. There was a toilet and a sink in the cell, and on the floor was a concrete slab about 9 feet long, 3 feet wide and 12 inches high. Normally a mattress is placed on this slab and serves as the inmate's bed.

It was shown during the trial that the recommended procedure, when a prison official places an inmate in the I.C. area, requires that he notify his immediat. superior. It is significant that no evidence, other than the absence of any reference to McCray in the log book during this period, was introduced to indicate that the defendant had not complied with this directive. Sgt. Smith testified that they try to log all occurrences, but if there is considerable activity among the inmates, often the guards are unable to make these entries.

The next day when Sgt. Smith checked the plaintiff he discovered that McCray had defecated in a cup, and smeared this waste throughout the cell. Smith then notified the psychologist, Mr. Musk, and decided to retain McCray for an additional day. While it appears that Mr. Musk may not have examined the plaintiff before he was removed from the I.C. area, it is possible that this may have been due to the fact that November 21st was a Sunday. Mr. Musk testified that he did not recall talking

to McCray about this specific incident, nor did he have a record of such a meeting. However, it was brought out during his testimony that he had spoken to the plaintiff on at least ten occasions, and he had made a record of only four of these visits.

Plaintiff also alleged that he was not given any showers during the two days that he was confined in I.C., but the records introduced at the trial clearly indicated that he was given a shower on November 20, 1971.

The incident that is the basis for McCray's suit against Captain Burrell occurred on January 1, 1972. The plaintiff had been placed in Cell #325 on the South Wing on December 31, 1971 sometime between 6:00 and 7:00 p.m. The defendant was a correctional officer and a duty captain whose responsibility was the operation and administration of the entire Penitentiary on the 8 a.m. to 4 p.m. shift.

Plaintiff had been placed in cell #325 by Officer Fazzio, and it appears that the cell had not been cleaned since the departure of the last occupant. There was paper, dirty blankets, a metal locker and other trash lying on the floor. The plaintiff requested that the cell be cleaned up, but was informed that it was too late in the evening. McCray then swept the trash in front of his cell door to be pushed out into the tier the following day.

At approximately 9 a.m. on January 1st he borrowed a cigarette and a light from the inmate in the adjacent cell, even though he testified that he usually does not smoke. The plaintiff alleged that he dozed off with the lit cigarette in his hand, and when he awoke the cell was filled with smoke. He testified that he did not set the fire intentionally, but he was charged with purposely causing the fire. Plaintiff stated that he jumped from bed and attempted to stamp out the fire, and when this failed he tried to smother the blaze with the mattress, but this merely worsened the situation.

He then took a bucket that was in the cell and tried to carry water from the sink to douse the fire. The bucket, however, would not properly fit under the sink to allow plaintiff to fill it sufficiently for it to be useful. He then used the metal cabinet which was lying on the floor of the cell to first break the sink and then the toilet in alleged efforts to allow the water to flow more freely. When these attempts failed he covered his head and body with water.

The guards, in the meantime, had attempted to put out the fire but the fire extinguisher did not work properly. After a short period of time, they procured a second extinguisher and managed to put out the fire.

The plaintiff testified that he had suffered burns to his hands and face, but the testimony of the nurse on duty at the time of the fire, Mrs. Weber, and the dispensary records, revealed that there were no blisters or serious burns evident. She stated that when the plaintiff was brought into the infirmary he was arrogant and initially refused to allow Officer Martin to apply cold compresses to the areas that he complained had been burned. However, the officer was finally able to apply the compresses and bacitracin ointment to his burns. His eyes were irrigated and his ears were washed out. Mrs. Weber, according to the testimony of the plaintiff, then recommended that he be placed in a locked cell. Captain Burrell ordered that he be placed in the Mental Observation area (M.O.). Captain Burrell testified that he issued this order because he had been informed that the plaintiff had intentionally set the fire, and, since this was not a rational act, he believed that the inmate was mentally unstable. Captain Burrell made a reasonable determination from the circumstances at the time. Having done this he decided, for the safety of the other inmates and the plaintiff, to place McCray in M.O. without clothes or a mattress. He testified that whenever he had reason to believe that an inmate might try to injure himself he removed from the cell any items that could be used for this purpose.

The plaintiff was allowed to remain in the M.O. area for approximately forty-eight hours, from January 1-3, 1972. It does not appear that he was visited by a medical doctor, nurse, or a psychologist during this interval. It is important to note that shortly after the plaintiff was treated in the dispensary, Nurse Weber contacted Dr. Holljes and advised him that the patient had been placed in M.O. She also attempted to contact a Dr. Stewart but was unable to reach him. The records introduced indicated that the plaintiff was next seen by a physician, a Dr. Wood, on January 4, 1972.

On January 13th the plaintiff was examined by Dr. Gould, who testified that at this time he noticed several crusted sores on McCray's cheeks, ears, a small amount on his back (which the plaintiff did not remember until questioned on cross-examination), and some sores on his knuckles. Dr. Gould further testified that the application of cold compresses and an antibiotic ointment, similar to the type applied to the plaintiff by Officer Martin, was the appropriate treatment to be employed. While he stated that this treatment should have been continued for a period of time, he could not say that it was inadequate.

Although no testimony was given to explain why a psychologist did not examine the plaintiff during his confinement in the M.O. area, it is evident to this Court that the New Year's holiday weekend was a contributing factor. Captain Burrell mentioned during his testimony that the Penitentiary was short-handed at this time, a factor he considered when he decided to place the plaintiff in the M.O. area.

The plaintiff contends that the procedures employed by both defendants were disciplinary in nature, and that they violated his right to due process of the law. He asserts that the requirements of due process were not satisfied when the defendants failed: (1) to give him adequate notice of the charges; (2) a hearing before a relatively objective tribunal; and (3) an opportunity to respond to or explain the alleged offenses.

It is true, as the plaintiff points out, that when a prisoner is subjected to substantial deprivations, they should be premised on a rational determination of facts. *See* Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971), cert. den. 404 U.S. 1049, 92 S. Ct. 719, 30 L. Ed. 2d 740 (1972). However, this Court disagrees with the allegations that the defendants transferred the plaintiff to an isolated area for disciplinary reasons. Rather, the testimony was quite clear in both cases that McCray had caused substantial disturbances, and he had been removed to avoid the possibility of continued disruptions that might involve substantial portions of the South Wing. It is important to bear in mind that the Maryland Correctional System, like many others, has been plagued by considerable prisoner unrest. While this Court is not absolving the prisons of all responsibility for this problem, it is clear that a prison correctional officer must be concerned with avoiding situations which could ignite a riot. This was the principal factor considered by the defendants in placing the plaintiff in an isolated cell.

In both cases, once the decision to isolate the plaintiff was made, the defendants were faced with a dilemma. Sgt. Smith had to determine if the plaintiff's outburst was merely a way of venting his frustrations, or whether he was in such a frame of mind that he would actually attempt to harm himself. Captain Burrell's task was certainly no easier. Once he concluded that McCray may have set his cell on fire intentionally, a conclusion undoubtedly buttressed by the guards' reports and the fact that the plaintiff did not ordinarily smoke, the defendant Burrell had to determine if the plaintiff would continue to act in a dangerous and disruptive manner. Since the deliberate setting of a fire was not only dangerous to the other prisoners, but to the plaintiff as well, he had to be sure that McCray could not attempt to injure himself in some other way.

To require a prison official to refrain from isolating an inmate until a due process hearing can be held to

determine if the prisoner might attempt to harm himself, and still subject the official to liability for not controlling the actions of that particular inmate, is totally unreasonable. Such a standard of conduct would lead to the resignation of many competent guards, and would deter others from pursuing this occupation as a career. The net result would be an everincreasing manpower shortage in our correctional systems, a problem that is already a major problem.

Captain Burrell and Sgt. Smith both stated that it was standard operating procedure, when confronted with an inmate exhibiting an irrational state of mind, to strip him of his clothes and remove the mattresses. While this procedure obviously caused the plaintiff considerable discomfort, it was certainly reasonable for the defendants to opt for this alternative rather than to risk the chance that the plaintiff might use these items to harm himself. Neither Sgt. Smith nor Captain Burrell had any other choice but to place McCray in an isolated cell for the security of the Penitentiary, and it was necessary to remove all of his clothes and the mattresses from the cell for his own safety.

While, ideally, it may be preferable to remove a prisoner placed in isolation for nondisciplinary reasons after a few hours, in these two cases such a course of action did not appear to be feasible at the times involved. When Sgt. Smith ordered the plaintiff removed from his cell on the South Wing, McCray reacted violently. After a night in the isolated confinement area, Sgt. Smith discovered that he had defecated and smeared his waste about the cell. Under an Administrative directive issued on August 10, 1970 by the Deputy Commissioner of the Department of Correctional Services, James Jordan, in the absence of a psychologist/psychiatrist, an inmate may be placed in an isolation cell for his own safety, or that of the inmate population, when he displays mentally disturbed behavior. Such behavior was clearly present in the instant case. The directive further provides that a psychologist/psychiatrist

be immediately notified after the confinement, and the inmate should be evaluated within a twenty-four hour period. While Sgt. Smith may not have followed this directive to the letter, he did notify the psychologist the following morning, Sunday, November 21, 1971, when he discovered that the plaintiff had smeared defecation about his cell. He then ordered the cell cleaned and scrubbed, and after another day of observation he had McCray returned to the third tier of the South Wing.

In the case involving Captain Burrell, the plaintiff was confined in isolation in the Mental Observation area for forty-eight hours. This incident not only occurred during the New Year's Day holiday period, a time when a substantial portion of the prison staff was on leave, but had endangered the lives of every inmate confined on the South Wing. Thus, the most pressing matter facing the defendant was the protection of the other inmates. Confronted with a skeleton crew of guards, his only alternative was to separate the plaintiff from the rest of the inmates until his staff returned to its normal strength on Monday, January 3rd. It also appears that the decision to deprive the plaintiff of his clothes and a mattress during the entire forty-eight hour period may have stemmed from the unavailability of a psychologist who could examine and evaluate McCray's condition.

None of these events constituted an arbitrary and capricious punishment of the plaintiff. In neither case was he removed from the South Wing as a disciplinary measure, but rather as a security precaution. The plaintiff's clothing and mattress were removed in both cases when he was placed in an isolation cell, in a reasonable attempt to prevent him from injuring himself. The length of time that he remained in isolated confinement was not unreasonable under the circumstances in either case. The fact that the plaintiff was not examined by a psychologist on either occasion was not a result of neglect by the defendants, but appears to have been caused by the unavailability of such personnel during the weekends in

question. The Court thus concludes that Sgt. Smith and Captain Burrell did not arbitrarily impose a punishment upon the plaintiff in violation of his right to due process, but rather they were attempting to take reasonable precautionary measures to insure the safety of the plaintiff and the other inmates of the Penitentiary.

The plaintiff further contends that the condition of the cells and the lengths of time that he was confined constituted cruel and unusual punishment in violation of the eighth amendment. While the conditions of the cells were by no means luxurious, and his confinement undoubtedly unpleasant, this Court does not find that it constituted cruel and unusual punishment. When testifying on his own behalf against Sgt. Smith, the plaintiff admitted that when he discovered the condition of the first cell in which he was placed on the South Wing he "really started to perform." He also testified that he had, in fact, "hollered" long and loud when he did not immediately receive his legal materials. Once Sgt. Smith ordered the plaintiff removed from his cell and placed in the I.C. area, it appears that the plaintiff indicated he intended to do bodily harm to himself. Since Sgt. Smith had met McCray for the first time that same day, it was reasonable under the circumstances that he remove all items from the cell that could be used by plaintiff to carry out his stated intention.

Captain Burrell ordered the plaintiff confined in the Mental Observation area without clothing and without a mattress for similar reasons. The defendant testified that the intentional setting of a fire in one's cell was clearly an irrational act, and it is standard operating procedure at the Penitentiary to place an inmate in an isolated cell without clothes or a mattress when he exhibits an unstable state of mind.

The confinement of the plaintiff in both cases for forty-eight hours was not an unreasonable period when one considers the surrounding circumstances in each case.

Sgt. Smith returned the next morning to find that the plaintiff had smeared defecation in his cell. This demonstrated a somewhat less than stable condition, and an additional twenty-four hours in isolation withour clothes appears to have been warranted. Captain Burrell was faced with an inmate who had attempted to burn his cell, and possibly the entire South Wing. The Penitentiary was operating at this time with a skeleton crew, and did not return to its normal strength until January 3, 1972, the day the plaintiff was released from the M.O. area.

The physical aspects of the cells in the isolated cell area and the mental observation area (which are substantially the same) are primitive at best. However, it is significant that the plaintiff candidly admitted on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers. While it is true that he was fully clothed on these latter visits to I.C., it does indicate that the conditions of the cells were not intolerable.

The Court concludes that the defendants' actions were not excessive exercises of authority beyond the limits of civilized standards of decancy. *See* Trop v. Dulles, 356 U.S. 86, 100-101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). Nor were they intended as punishment for the plaintiff's conduct, but, as has been repeatedly stated, they were employed as precautionary measures. The removals of the plaintiff from his cell on the South Wing to isolated cells were not pointless impositions of suffering, nor was there a less severe alternative that would have achieved the purposes for which the confinement was imposed. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 2747, 33 L. Ed. 2d 346 (1972).

[7] While the plaintiff asserts correctly that punishments which are not *per se* cruel and unusual may become so if they are disproportionate to the offense committed, such is not the case here. He cites LaReau v. MacDougall, 473 F.2d 074, 978 (2d Cir. 1972) for the proposition that

confinement in strip cell, even for short durations of time, falls "below the irreducible minimum of decency required by the Eighth Amendment." However, that case is distinguishable from the ones before this Court. In *LaReau* the prisoner was found in possession of contraband materials. Pursuant to prison regulations he was punished by the imposition of an indeterminate sentence, and he served five days in isolation. The finding there of cruel and unusual punishment by the Second Circuit appears to have been premised upon the fact that the punishment was disproportionate to the offense committed, and that a less severe punishment would have adequately achieved the purposes for which the punishment was imposed. Such in not the case here. The plaintiff was not confined as a punishment. He was isolated for his own protection and that of the other inmates. He was not confined any longer than was necessary to insure this protection. The placement of the plaintiff was not unreasonable in light of his conduct, nor was there a less severe alternative available to the defendants.

[8] The allegation made in Civil Action No. 72-68-N, that Captain Burrell caused the plaintiff to be denied adequate medical care, is totally without merit. He was taken directly to the dispensary for treatment after the fire was placed under control. The treatment received by the plaintiff was shown to be the appropriate care for the type of injuries that he had allegedly received. Any failure of the medical staff to diagnose the extent of the injuries was directly attributable to the plaintiff's conduct. When he first arrived at the dispensary he was arrogant and refused any treatment. It was due only to the perseverance of Nurse Weber an Officer Martin, and their willingness to spend four times the normal length of time treating the prisoner, that he received any medication at all. Once he was placed in the mental observation area, Nurse Weber contacted Dr. Holljes and informed him of the incident, plaintiff's complaints, the extent of his injuries as she perceived them and the treatment administered to him. Dr. Holljes instructed her to contact Dr. Stewart, which

she unsuccessfully attempted to do. She testified that she did not continue in her efforts to reach Dr. Stewart because at 2 p.m. that same day there was no complaints from the plaintiff. In addition to this treatment, Mr. Musk, a psychologist for the Penitentiary, testified that he saw the plaintiff the week of January 4th concerning the incident.

Even if the plaintiff had not received this care, the Court does not see how Captain Burrell could possibly be held liable. His unrefuted testimony was that he was responsible for the control and security of the hospital, but not for its operations. Clearly, if the plaintiff was not treated properly by the medical staff, which the Court emphasizes was not the case, this could not be attributed to the defendant.

[9] The defendants in these cases also have available to them the defense of reasonable good faith that their actions were constitutionally permissible. Landman v. Royster, 354 F. Supp. 1302, 1317 (E.D. Va. 1973). The applicability of this defense to damage actions brought by a prisoner under § 1983 was recently recognized by the United States Court of Appeals for the Fourth Circuit in Skinner v. Spellman, 480 F.2d 539 (4th Cir., 1973). In that case the Court held that if the defendant could show he was acting in reasonable good faith reliance on standard operating procedure, he would not have to respond in damages.

In Civil Action No. 72-234-N, the testimony established that the plaintiff was causing a disturbance on the South Wing, and that the other inmates requested he be removed. It was also brought out on the cross-examination of Sgt. Smith that he had the authority to place an inmate in the I.C. area, and that after such action he was to immediately notify his immediate superior. There was no evidence introduced which would lead this Court to believe that Sgt. Smith had not notified his superior. The defendant Smith also stated there was a verbal understanding on the South Wing that an inmate was not to be

kept in isolation for more than three days. This procedure was followed in this case.

In Civil Action No. 72-68-N, Captain Burrell followed an Administrative directive when he confined the plaintiff in the Mental Observation area after the latter apparently started a fire in his cell. Defendant stated that it was a normal operating procedure to remove the clothes of a prisoner who had exhibited an unstable mental and emotional state.

Therefore, since the defendants, as shown from all the facts, acted in good faith in exercising their discretion, Bennett v. Gravelle, 323 F. Supp. 203, 214 (D. Md. 1971), they are immune from suit under 42 U.S.C. § 1983.

For the reasons stated herein, it is this 16th day of October, 1973, ordered:

1. That the defendants' Motions to Dismiss in Civil Actions Nos. 72-68-N and 72-234-N be, and the same hereby are, granted;

2. That plaintiff's claim for relief in Civil Action No. 72-68-N be, and the same is, denied; and

3. That the plaintiff's claim for relief in Civil Action No. 72-234-N be, and the same hereby is, denied.

367 F. Supp. at 1210-1217.

CENTRAL OFFICE
DEPARTMENT OF CORRECTIONAL SERVICES

ADMINISTRATIVE DIRECTIVE — No. 12-70 Addendum

Subject: — Efective 8-10-70

Adjustment Procedure (*Addendum*)

To Wardens And Superintendents:

Punitive or isolation cells will be used only when an inmate is emotionally disruptive and will be used only as a

cooling off period, which can entail from one hour up to the time the inmate is reasonably calm enough to go to a segregation area without becoming disruptive. The punitive or isolation cells are not to be used as a *routine punishment area.*

Institutions that do not have mental observation cells may use the punitive or isolation cells for the purpose of housing inmates who are mentally disturbed, but only upon the approval of a psychologist or psychiatrist.

In the absence of the psychologist or psychiatrist, an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified. The psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period.

JAMES JORDAN,
Deputy Commissioner.

JJ:mls

Date: August 10, 1970

Distribution: All Managing Officers — 2
Deputy Commissioner — 1
All Program Heads — 1
Policy Book — 1
Others:

DC Form No. 2

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

SGT. B. D. SMITH,	:	October Term, 1980
Petitioner	:	
v.	:	No. 80- 329
MILTON McCRAY,	:	
Respondent	:	

RESPONDENT'S MOTION TO FILE A BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI AND TO PROCEED TO THE TERMINATION OF PROCEEDINGS IN FORMA PAUPERIS

Pursuant to 28 U.S.C. §1915 and Rule 46 of this Court, Respondent by his counsel moves this Court for an Order permitting him to file his Brief in Opposition to Petitioner's Petition for Writ of Certiorari and to proceed to the termination of proceedings in forma pauperis, or without the payment of any fees, costs, or security therefor, because as set forth in this Motion and the attached Affidavit:

1. Respondent is indigent and unable to pay any fees, costs, or security to so proceed;

2. In forma pauperis status was sought and granted in the United States District Court for the District of Maryland and on appeal in the United States Court of Appeals for the Fourth Circuit.

RICHARD G. FISHMAN, ESQ.
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA. 16801
814/238-4958

Attorney for Respondent

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No. 80-329

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SGT. B. D. SMITH,

Petitioner

v.

MILTON McCRAY,

Respondent

BRIEF IN OPPOSITION TO A
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. FISHMAN
Keystone Legal Services, Inc.
251 South Pugh Street
State College, Pennsylvania 16801
814/238-4958

Attorney for Respondent

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No. 80-329

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SGT. B. D. SMITH,

Petitioner

v.

MILTON McCRAY,

Respondent

BRIEF IN OPPOSITION TO A
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

In McCray's suit against Maryland Penitentiary Officer, Sgt. B. D. Smith, the Respondent sought compensatory and punitive damages for being maliciously placed in an isolated confinement (I.C.) cell without clothes and items of personal hygiene and subject to conditions that allegedly violated the Eighth and Fourteenth Amendments to the United States Constitution.

The Fourth Circuit in McCray v. Burrell I, 516 F.2d 357, 368 (4th Cir. 1975), recognized in the case against Smith that:

> [A] prisoner evidencing mental derangement in a form suggestive of self-harm or harm to others may and should be removed from the general prison population until his true condition can be assayed by those competent to evaluate him; and, until his examination and the formulation of expert opinion, he may be subjected to protective measures.

1/ 31a-32a. However, it held that the conditions of confinement for McCray in the I.C. cell could be justified constitutionally only if the administrative directive requiring the summoning of expert medical attention in the situation was followed. Id. In McCray v. Burrell II, 622 F.2d 705, (4th Cir. 1980), compliance with the administrative directive 12-70 was found not to be forthcoming by Smith. 5a.

McCray spent almost two days in the I.C. cell nude and without any items of personal hygiene and initially was placed in there without a mattress. 25a-27a. No psychiatrist or psychologist ever examined McCray while in I.C. contrary to Petitioner's assertion at page 6 of his Petition for a Writ of Certiorari (Petition). 27a. By Petitioner's own admission he did not notify the psychologist pursuant to the administrative directive until almost 24 hours after McCray's placement in I.C. Smith admitted this notification responsibility was his own.

The only non-party witnesses who testified in regard to Sgt. Smith were Deputy Commissioner of Correction Herndon and Major Clingenpeel. Both testified that under the circumstances of McCray's confinement in an I.C. cell without clothes or a mattress that the psychologist had to be contacted and that

1/ "a" indicates what page of the appendix.

contacting that person almost 24 hours later did not comply with the administrative directive. Major Clingenpeel was a penitentiary officer for over 28 years.

Contrary to Petitioner's assertions, Sgt. Smith testified as to the harm he perceived from McCray's behavior, which resulted in his removing McCray's clothes and denying him a mattress. He also stated that if he perceived no harm the inmate got a mattress and coveralls when going into I.C.

Smith testified about the situation in 1973, as follows: "Well, he [McCray] did'nt make any specific harm, but he said he wasn't going to do any time in the South Wing, he would rather die than do time in the South Wing, and so, that was enough for me to see that he might do something to injure himself, that's why I took precautions." Smith also said in 1973, as he did in 1977, "If an inmate is going to do some harm to himself, I remove the mattress. If he's not attempting to do any bodily harm to himself, he gets a mattress when he goes in. Also, a pair of coveralls."

McCray received neither clothes nor a mattess. Thus, Smith thought he was going to harm himself. There is no indication he thought McCray was merely acting out. Furthermore, McCray had already ripped the locker off his cell wall and "[H]e started screaming, you know, real loud, as a matter of fact, I [Smith] never heard a man scream as loud before . . ."

If Sgt. Smith did not think McCray was in such a mental state as to justify contacting a psychologist, there was no basis for his confining him under the conditions of I.C. described herein. In this regard, the Fourth Circuit noted:

> What is clear, however, is that if McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment.

The conclusion that McCray was in such a mental state as to require immediate medical attention is buttressed by the District Court's prior decision when it discussed the directive and said "[A]n inmate may be placed in an isolation cell for his own safety or that of the inmate population when he displays mentallydisturbed behavior. Such behavior was clearly present in the instant case." McCray v. Burrell, 367 F.Supp, 1191, 1214 (D.Md. 1973), 45a.

Smith, in 1977, shifted his position to attempt to come within the confines of a subjective good-faith defense, by now claiming that he did not think McCray would harm himself. The Fourth Circuit recognized this shift in position. 5a. Again, as in McCray I, the Court proclaimed that if Smith only thought McCray was "acting out" or emotionally disruptive, then the conditions under which he was placed in I.C., without prompt medical attention, could not be justified. Id.

SUMMARY OF ARGUMENT

The Petitioner has failed to substantiate any reason under Rule 17 of this Court to justify its issuance of a Writ of Certiorari. The Petitioner is merely asking for this Court to make a factual determination more to his liking, even though the Court of Appeals followed established law and usual judicial proceedings in reaching its decision.

The Fourth Circuit gave due deference to the findings of the Trial Court but effectively found them clearly erroneous because of their illogic and internal inconsistencies and appropriately applied the tests of good-faith defense as established by the decisions of this Court.

ARGUMENT

A. CONSIDERATIONS UNDER RULE 17 ARE ABSENT IN THIS CASE AND THE WRIT SHOULD BE DENIED

The Petitioner has presented no argument within the meaning of Rule 17 of this Court to justify issuance of the Writ. Petitioner has merely asked this Court to make a subjective analysis of facts for purposes of a good-faith defense surrounding the Respondent's confinment in I.C. by Smith. The Fourth Circuit did not "so far depart[ed] from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision" within the meaning of Rule 17. The Court of Appeals merely reached a result on the subjective prong of a good-faith defense which was contrary to the wishes of Petitioner.

As Petitioner has the burden on a good-faith defense[2/] and since he failed to satisfy the subjective test, there was no necessity for the Fourth Circuit to examine the then existing case law as part of the objective standard of good-faith. Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975). Consequently, Petitioner's argument at page 13 of his Petition that the Fourth Circuit emasculated the objective standard of Wood and Procunier is inapplicable.

B. SUBJECTIVE BAD FAITH WAS PRESENT

As to what constitutes malicious intent for purposes of an

2/ Gomez v. Toledo, ___U.S. _____, 100 S.Ct. 1920 (1980).

analysis of subjective good-faith, this Court has referred to the RESTATEMENT (SECOND) OF TORTS §8A (1965). Procunier v. Navarette, 434 U.S. at 566. Malicious intent under the Restatement includes intentional injury. Id. Yet, this malicious intent also includes reckless conduct of one who does not intend to cause the consequences of his acts, but should realize that there is a strong probability that the harm will occur. Id. at §500; Bogard v. Cook, 586 F.2d 399, 412 (5th Cir. 1978). Comment b to Section 8A in recognizing this identical treatment states, "If the actor knows that the consequences are certain, or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." Furthermore, unlike Procunier, the instant case does not contain only an allegation of negligent conduct on the part of prison officials.

Here, Smith was aware of the probable harm to McCray and since his condition required the contacting of medical help as soon as he was placed in I.C., as testified to by Deputy Commissioner Herndon and Major Clingenpeel, Sgt. Smith must be treated as having intended the consequences of his acts within the meaning of the word malicious. The Opinion in McCray II is not to the contrary.

C. DUE DEFERENCE WAS ACCORDED THE FINDINGS OF THE TRIAL COURT

While Rule 52(a) of the Federal Rules of Civil Procedure requires that findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witness," this rule was adhered to in the case at bar, under various decisions interpreting the meaning of "clearly erroneous" and "credibility of the witness."

In Jones v. Pitt County Board of Education, 528 F.2d 414, 418 (4th Cir. 1975), the Court held:

> We recognize that we are not bound by the factual determinations of the District Court merely because they are supported by substantial evidence, and that a finding may be rejected as "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. U. S. Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

See, e.g., G & R Corp. v. American Security and Trust Company, 523 F.2d 1164, 1171, 1172 (D.C. Cir. 1975); Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973); Fisher v. United States, 441 F.2d 1288, 1290 (3rd Cir. 1971).

It has been held that even where "substantial evidence" supports the fact-findings, they may be set aside, if the Court "[I]s convinced that the finding does not reflect the truth and right of the case." Bianchini v. Humble Pipeline Co., 480 F.2d 251, 253 (5th Cir. 1973).

As to credibility, it has been stated it "[I]nvolves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2585 at 736-737.

Finally, "It is essential, however, that there be a logical and convincing connection between the facts established and the conclusion inferred." United States v. Bycer, 593 F.2d 549, 550 (3d Cir. 1979).

The internal consistency and logical connection of facts with the conclusion drawn did not hold together in this case.

In 1973 Smith asserted his fear of harm to McCray as a justification for initially placing him in I.C. without clothes or a mattress. Four years later he cannot claim that this fear never existed, as an excuse for his failure to promptly summon medical help.

D. PETITIONER FAILED THE OBJECTIVE TEST OF A GOOD-FAITH DEFENSE EVEN IF THE SUBJECTIVE PRONG WAS SATISFIED

Even under an objective analysis of good-faith, Sgt. Smith in 1971 would have been on notice as to the unconstitutionality of his actions. The District Court either ignored then existing case law or read the issue too narrowly in stating it could find no decisions giving Respondent an unquestioned right to have a psychologist immediately notified. 16a; Petition at 11-12.

In the cases cited by the District Court in its Opinion as not putting Sgt. Smith and Captain Burrell in the companion case on notice as to the unconstitutionality of their actions,[3/] medical care or its availability was either an essential issue in evaluating the conditions of confinement or prison regulations were discussed or cited which required the permission of a medical person or psychiatrist in order to place an inmate in a stripped cell without clothes or sanitary articles.

In Jordan v. Fitzharris, 257 F.Supp. 674 (N.D. Cal. 1966) the Plaintiff brought suit about conditions in solitary confinement strip cells, including a Chinese toilet flushed from the outside, lack of sanitation or sanitary articles in the cells, improper lighting and a lack of cell bedding and furnishings and inadequate medical care. Id. at 676-678.

In finding these conditions unconstitutional, the Court in Jordan commented on a proposed manual of procedures for use of the strip cells and said:

3/ 17a-22a

> [T]he practices set out in the manuals relied upon by defendants would, if adopted and followed, meet the minimum standards required by the Eighth Amendment.

Id. at 683. The manual provided in part:

> The not uncommon practice of confining insane inmates there [in strip cells[is indefensible, all insane inmates should be transferred to a mental hospital or medical psychiatric treatment facility.

Id. Jordan would at a minimum here, command a psychiatric or psychological person to attend to McCray who was confined under similar conditions.

In Wright v. McMann I, 387 F.2d 519 (2d Cir. 1967) conditions involving being placed nude in a barren, dirty cell, in the cold of winter without hygienic materials was held to be a violation of the Eighth Amendment, if proven. Id. at 526. In making its determination the Court specifically referred to regulations of the United States Bureau of Prisons as not permitting the conditions Wright alleged:

> They require that "the quarters used for segregation shall be well ventilated adequately lighted, appropriately heated and maintained in a sanitary condition at all times," an inmate can be deprived of clothing only when prescribed by the Chief Medical Officer for medical or psychiatric reasons; and toilet tissue, tooth brush, comb, etc. are not to be denied a segregation inmate.

Id. This case was then remanded to the District Court which found Wright's nude confinement in a strip cell cruel and unusual punishment. Wright v. McMann, 321 F.Supp. 127, 128 (N.D.N.Y. 1970). The Dis trict Court in Wright also required appropriate regulations be issued prior to the cells being used. On appeal, the Second Circuit reversed that part of the lower Court Order requiring new regulations because in its Opinion, rules already

existed to cover the situation. Wright v. McMann II, 460 F.2d 126, 131 (2d Cir. 1972).

The regulations in Wright provided for various furnishings and health and sanitation conditions for one confined in punitive segregation. Id. 7 N.Y.C.R.R. §§300.1-301.9. The District Court here states in this regard "the court [in Wright] tacitly approved regulations permitting the removal of lights, toilets, beds, washstands and mattress from psychiatric observation cells if there was imminent danger that the inmate would destroy them or use them to harm themselves". 22a. / However, the District Court in the case at bar ignores the following part of these same regulations, also cited in Wright:

> "(d) In cases where the inmate is deprived of clothing, and is without some sufficient means of covering his body, or where the inmate is kept in a cell without mattress and blankets at a time when inmates in the general population are in bed, the report shall be delivered to whoever is in charge of the facility at the time and it shall be the duty of that person to make every effort to have a physician visit the inmate immediately. If a physician cannot visit the inmate within two hours of the time the inmate is deprived of the item, it shall be the duty of the person in charge of the facility at the time to personally visit the inmate and determine the necessity for deprivation of the item and, where such deprivation is continued, to arrange for a physician to visit the inmate as soon as possible."

7. N.Y.C.R. §301.7(d).

These New York correction regulations as set forth in the second Wright v. McMann case would certainly indicate a duty to get medical help for McCray.

Landman v. Royster, 333 F.Supp. 621 (E.D.Va. 1971), involved a suit brought over solitary confinement conditions including denuding of an inmate and removal of a mattress, among

other deprivations. Id. at 627. As to denuding it was said: "The Court will permit an inmate to be kept nude in his cell only when a doctor states in writing that the inmate's health will not thereby be affected and that the inmate presents a substantial risk of injuring himself if given garments." Id. at 648. The Landman Court went on to say "If the cell is otherwise clean, and well heated, and the prisoner keeps his clothing, it should not be detrimental." Id. at 649.

In Hancock v. Avery, 301 F.Supp. 786 (M.D.Tenn. 1969), a prisoner was placed for non-punitive reasons in solitary confinement. The cell conditions included a chinese toilet (flushing controlled by an outside officer), no lighting, no hygienic or sanitary facilities and plaintiff's nude placement on a concrete floor for purposes of sleeping. Id. at 791-792.

Interestingly, the defendants in Hancock argued that the conditions were constitutional because plaintiff had a daily opportunity to make complaints to medical personnel. Id. at 789. Despite this argument the Court went on to say that "confinement under the conditions of harshness and cruelty reflected by the present record should not be tolerated for any length of time, however brief." Id. at 792.

In Jones v. Wittenberg, 323 F.Supp. 93, 99 (N.D.Ohio 1971) the Court found conditions similar to those in the instant case as cruel and unusual punishment. The same Court later spoke more directly to the issue, and proclaimed standards in Jones v. Wittenberg, 330 F.Supp. 707, 720 (N.D.Ohio 1971). The Court in Jones v. Wittenberg stated that isolation must have proper heat, light, ventilation and sanitation and that prisoners not be deprived of clothing. Id. Its conditions were to mirror those

in the normal institutional population except for freedoms and privileges. Id. Furthermore, "Prisoners who appear dangerously violent or suicidal must be examined immediately by a physician, and if he deems it advisable, removed to a mental hospital." Id.

In Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), the Court decried the lack of effective control and supervision on personnel in direct charge of segregation, which ultimately adds punishment to those confined there and raises due process and Eighth Amendment questions. Id. at 139, 141. Such problems are present in the case at bar.

Furthermore, the District Court's distinguishing of isolation cases involving similar conditions on the basis that they involved punitive confinement[4/] only strengthens the plaintiff's case as what may be justifiable in a punitive setting will not necessarily survive in the situation here. McCray v. Burrell, I, 516 F.2d at 367, 29a-30a.

Other Courts deciding cases around the time of the incident here and involving similar conditions have also found them unconstitutional, in violation of Eighth Amendment proscriptions. Anderson v. Nosser, 438 F.2d 183, 193 (5th Cir. 1971); Knuckles v. Prasse, 302 F.Supp. 1036, 1061 (E.D.Pa. 1969); aff'd (per curiam) 435 F.2d 1255 (3d Cir. 1970); Holt v. Sarver, 300 F.Supp. 825, 832-833 (E.D.Ark. 1969).

Thus, the objective test of good faith indicates the state of the law of the time at the incident in question clearly established that McCray could not be confined with a lack of medical attention under the deprivations present. Sgt. Smith should have been on notice of the various decisions discussed herein.

4/ 21a

As Sgt. Smith was under an obligation to follow a directive prescribing immediate medical attention, his position is even more untenable than the situation where medical care is not provided, but no regulation prescribing such exists for guidance.

Thus, under the objective or subjective test there is nothing to indicate the Fourth Circuit substantially departed from the usual course of judicial proceeding in reaching the result involved in this case.

CONCLUSION

WHEREFORE, Respondent prays that the Petition for a Writ of Certiorari be denied.

RICHARD G. FISHMAN, ESQ.
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA. 16801
814/238-4958

Attorney for Respondent

No. 80-329

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SGT. B. D. SMITH,

Petitioner

v.

MILTON McCRAY,

Respondent

CERTIFICATE OF SERVICE

I, RICHARD G. FISHMAN, ESQ., hereby certify, pursuant to Rule 28.3 that I served a true and correct copy of the Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Respondent's Motion and Affidavit to Proceed in Forma Pauperis to Donald R. Stutman, Assistant Attorney General, Attorney for Petitioner, One South Calvert Building, Baltimore, Maryland 21202, by first-class mail postage prepaid on this 23rd day of September, 1980. I further certify that all parties required to be served have been served.

Richard G. Fishman

RICHARD G. FISHMAN, ESQ.
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA. 16801
814/238-4958

Attorney for Respondent